

Sexuality, Law and Legal Practice
and the Reformation in Norway

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VOLUME 44

Sexuality, Law and Legal Practice and the Reformation in Norway

By

Anne Irene Riisøy



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2009

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This book is printed on acid-free paper.

Library of Congress Cataloging-in-Publication Data

Riisøy, Anne Irene.

Sexuality, law and legal practice and the reformation in Norway / By Anne Irene Riisøy.

p. cm. — (The northern world no. 44)

Includes bibliographical references and index.

ISBN 978-90-04-17364-4 (hardback : alk. paper) 1. Sex crimes—Norway—History. 2. Sex and law—Norway—History. 3. Sex—Religious aspects—Christianity—History. 4. Reformation—Norway—History. 5. Law, Medieval—History. I. Title. II. Series.

KKN4200.R55 2009

345.481'0253—dc22

2008051633

ISSN 1569-1462

ISBN 978 90 04 17364 4

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PRINTED IN THE NETHERLANDS

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ACKNOWLEDGEMENTS

This book is the offspring of my doctoral dissertation, which I defended at the *University of Oslo* in December 2006. First of all I would like to thank Jón Viðar Sigurðsson and Steinar Imsen for their advice, support and generous help. I would also like to thank Signe Horn Fuglesang, Joanna Agnieszka Skórzewska, Annelene Svingen, Justyna Wubs-Mrozewicz and Randi Werdahl who have given me excellent support and reading help all around the clock. This slightly revised version of my doctoral dissertation has also benefited from comments and constructive criticisms by my doctoral opponents Thomas Lindkvist and Tor Weidling.

The *National Archival Services of Norway*, in particular Gunnar I. Pettersen and Halvor Kjellberg, have given invaluable help with the interpretation of sources. I am also very grateful to the *Stephan Kuttner Institute of Medieval Canon Law* in Munich for generous provision of research facilities, to Peter Landau and his *Frau Angelika* for their warm welcome and to Jörg Müller who is always very kind and helpful. Karan Danbolt, at the *Faculty of Law* at the *University of Oslo*, is a pearl among librarians and I am also indebted to Brill's Marcella Mulder for enduring patience and for providing me with quick and efficient help. Besides, in times of need, the administrators are friends indeed: thanks to Jorunn Bjørgum, Kristin Kjellberg and Finn Erhard Johannessen.

Without financial support of *The Research Council of Norway* (three years doctorate funding followed by funding for translation and proofreading) this work would not have been possible. I am also indebted to the *Faculty of Humanities* at the *University of Oslo* which granted me four extra months of funding. For translating and proofreading: thanks to Ian Bauermann and Susan Jackmann.

ABBREVIATIONS

Full bibliographical references to the works mentioned in the list below are given in the bibliography at the end of this book.

A	Bishop Arne's Christian Law
B	Old Christian Law of the Borgarthing
DI	Diplomatarium Islandicum
DN	Diplomatarium Norvegicum
E	Old Christian Law of the Eidsivathing
F	Old Law of the Frostathing
G	Old Law of the Gulathing
J	Archbishop Jon's Christian Law
KL	Kulturhistorisk leksikon for nordisk middelalder fra vikingetid til reformationstid
L	Landslaw of 1274
NB	Young Christian Law of the Borgarthing
NG	Young Christian Law of the Gulathing
NgL	Norges gamle Love indtil 1387 (5 vols), I–V
NgL 2 rk	Norges gamle Love, andre række
NLR	Norske Lensrekneskapsbøger
NoMiddaldok	Norske Middelalderdokumenter
NRJ	Norske Regnskaber og Jordebøger
RegNorv	Regesta Norvegica

INTRODUCTION

During the last thirty years illicit sexuality has become an important line of research in Norway. Whereas medievalists have discussed the impact of Christianisation focusing on the period before the mid-thirteenth century, Early Modern scholars have been concerned with the impact of the Reformation, concentrating on sources primarily from the seventeenth century.

In this book it will be argued that the period from *ca.* 1250 to the promulgation of King Christian V's Norwegian Law in 1687 was marked by substantial legislative and judicial continuity in regards to extramarital sexuality and the manner in which it was criminalised and punished, as well as the position of women within the law.

This hypothesis differs from the prevailing view. Norwegian historians who have researched sexual crimes in the Early Modern Period subscribe to the view that the Reformation¹ is the beginning of a new era regarding official attitudes towards sexuality. They claim that sexual acts which had not been penalised earlier began to be brought to court and punished by the public authorities and that the severity of the sentences increased. Moreover, it is argued that women were now hit harder than in the Middle Ages when sexual relations before and during marriage

¹ For a general overview in English, see Ingun Montgomery, 'A reformation without a reformer: The Realisation of the Reformation in Norway' in *Church and People in Britain and Scandinavia*, ed. by Ingmar Brohed (Lund: Lund University Press, 1996) pp. 147–179; Martin Schwarz Lausten, 'The early Reformation in Denmark and Norway 1520–1559' in *The Scandinavian Reformation: From Evangelical Movement to Institutionalisation of Reform*, ed. by Ole Peter Grell (Cambridge: Cambridge University Press, 1995), pp. 29–33. In Denmark and Norway the Reformation was implemented by King Christian III after a protracted civil war. On 30th October 1536 Christian III issued a royal charter which stated that Norway should no more exist as an independent country but become a province of Denmark. On the same day the Catholic Church in Denmark was abolished, and the power between church and state was redistributed. The bishops were dismissed, and instead "Christian bishops and superintendents" were to be employed. In 1537 the last Catholic Archbishop left Norway, and King Christian III signed a new Lutheran Church Order or Ordinance. When this new order was accepted in Norway the same year, "It looks as if the introduction of the Reformation in Norway simply was an administrative act"; quote Montgomery, 'A reformation', p. 148. However, the practical implementation of the Reformation in Norway was to take place piecemeal.

were normally dealt with under civil law, and when the aim had been to make the lover pay economic compensation to the offended party, normally the woman's father or husband. By contrast, the criminalisation of sexuality that took place in the wake of the Reformation was based on the view that sexual offences were not merely a family matter, but were a concern to society at large.

Consequently, the prevailing view amongst historians of the Early Modern Period can be divided into three main areas: greater criminalisation of sexual acts after the Reformation, an increase in the severity of sentences and a deterioration of the position of women. The three areas are connected and form an indivisible logical structure. However, by extending the time-frame backwards and by using more extensive contemporary source material, it should be possible to argue for an alternative view which focuses on *continuity*.

Previous Research

In 1981 Hans Eyvind Næss claimed that "I løpet av de 150 årene fra 1537 til 1687 ble det vedtatt flere bestemmelser mot utenomekteskapelig seksuelt samkvem enn mot noen annen kriminalisert handling"² [during the 150 years from 1537 to 1687, more laws were introduced against extramarital sexual relations than against any other penalised acts]. This statement has been repeated in later studies on illicit sexuality. It has however never been asked to what extent these post-reformation laws represented new law or whether they were in fact based upon medieval legislation.

Næss' legacy can be seen in a number of studies from the 1990s, works which are mainly based on sources from south-west Norway in the seventeenth century. In chronological order, the most important ones are dissertations by Kari Telste (1993),³ Harriet Marie Terjesen (1994),⁴ and

² Hans Eyvind Næss, 'Trolldomsprosessene i Norge på 1500–1600-tallet: En retts- og sosialhistorisk undersøkelse' (unpublished dissertation (dr. philos), University of Oslo, 1981), p. 48.

³ Kari Telste, *Mellom liv og lov: Kontroll av seksualitet i Ringerike og Hallingdal 1652–1710* (Oslo: Tingsboksprosjektet, 1993).

⁴ Harriet Marie Terjesen, *Blodskam og leiermål i forbudne ledd: En studie med utgangspunkt i kilder fra Rogaland i tidsperioden 1602–1659/61* (Oslo: Tingsboksprosjektet, 1994).

Gro Elisabeth Bastiansen (1995).⁵ Based on legislation and a thorough discussion of legal practice, Telste studies the control of sexuality (primarily fornication and adultery) in Ringerike and Hallingdal during the period 1652–1710. Although Terjesen's main focus is incest in Rogaland during the period 1602–1659/61, she also undertakes a comprehensive analysis of legislation and the legal practice in regards to adultery and fornication. Bastiansen study whoring, fornication and prostitution in Bergen during the period 1597–1669. Telste, Terjesen and Bastiansen note great changes during the transition from medieval to Early Modern. Most importantly fornication and adultery were criminalised after the Reformation while during the Middle Ages these cases merely would have concerned the compensation to be paid to the insulted party.

Also worth mention is Anette Halvorsen Aarset's dissertation from 2000 on homosexuality during the period 1687–1902 which amongst other issues discusses the ideology behind the legislation on homosexuality, as well as how it was applied in practice.⁶ Two years later Øystein Viskum's dissertation on the prosecution of *crimen bestialitatis* in Norway during the period 1687–1842 appeared. Viskum examines which groups considered sexual relations between humans and animals so problematic that the culprits were burnt at the stake.⁷ Although Halvorsen Aarset's and Viskum's point of departure is the *Norwegian law* of 1687, they nevertheless include some older laws in their discussions.

Illegal sexuality of the post-Reformation period is also analysed in newer historical overviews. In 1999 Hilde Sandvik argues that the penalisation of fornication is in the first instance a Nordic phenomenon which can be linked to the state-church arrangements in Denmark, Norway and Sweden.⁸ This train of thought is taken up in *People Meet the Law: Control and Conflict-handling in the Courts: the Nordic Countries in the Post-Reformation and Pre-industrial Period* (2000). A summary on research concerning sexual crimes in Norway during the

⁵ Gro Elisabeth Bastiansen, 'Væ dig Bergen du fule Sodomæ oc Gomorrhæ søster: en analyse av utenomekteskapelige forhold i Bergen 1597–1669' (unpublished dissertation (hovedoppgave), University of Bergen, 1995).

⁶ Anette Halvorsen Aarset, *Rettslig regulering av homoseksuell praksis: 1687–1902* (Oslo: Institutt for offentlig rett, Universitetet i Oslo, 2000).

⁷ Øystein Viskum, 'Fortielse og straff: Rettsforfølgelsen av *crimen bestialitatis* i Norge 1687–1842' (unpublished dissertation (hovedoppgave), University of Oslo, 2002).

⁸ Hilde Sandvik, 'Tidlig moderne tid i Norge: 1500–1800', in *Med kjønnsperspektiv på norsk historie*, ed. by Ida Blom and Sølvi Sogner (Oslo: Cappelen akademisk forlag, 1999), pp. 116–122.

Early Modern Period can also be found in Gísli Ágúst Gunnlaugsson's article on sexual crimes in the Nordic countries, '*Sedlighetsbrott i Norden 1550–1850*' (1994).⁹

It is claimed that the increasingly strict criminalisation of pre- and extra-marital sexuality after the Reformation was a marked change when compared to medieval legal practices where claims were dealt with under civil law through compensational payment and in cases of adultery and fornication this was the only option. With the transition from the Middle Ages to the Early Modern Period we witness a transformation. In the late sixteenth century, a strong state both adopted the principle of individual penal responsibility and increased the severity of the sentences.¹⁰ One of the arguments here is that as a consequence of the growing importance attached to marriage after the Reformation, extra-marital sexuality was increasingly criminalised.¹¹ Regarding the increasing brutality of punishments, the finger is pointed at influences from Mosaic Law, which supposedly grew after the Reformation.¹²

Historians of the Early Modern Period also argue that legislation against sexual crimes during the post-Reformation period was far more

⁹ Gísli Ágúst Gunnlaugsson, '*Sedlighetsbrott i Norden 1550–1850*' in *Normer og sosial kontroll i Norden ca. 1550–1850: Domstolene i samspill med lokalsamfunnet. Det 22. nordiske historikermøte, Oslo 13.–18 august 1994, Rapport II*, ed. by Kåre Tønnesson (Oslo: Universitetet i Oslo, Den norske historiske forening, 1994), pp. 103–122.

¹⁰ Telste, *Mellom liv og lov*, pp. 59–60; Sandvik, 'Tidlig moderne', pp. 121–122; Terjesen, *Blodskam og leiermål*, p. 37 (comments on laws on whoring); Bastiansen, 'Væ dig Bergen', pp. 25–26; Aarset, *Rettslig regulering*, p. 16; Viskum, 'Fortielse og straff', pp. 7, 14–18; Heikki Ylikangas et al., 'Family, State, and Patterns of Criminality: Major Tendencies', in *People Meet the Law: Control and conflict-handling in the courts. The Nordic countries in the post-Reformation and pre-industrial period*, ed. by Eva Österberg and Sølvi Sogner (Oslo: Universitetsforlaget, 2000), pp. 113, 122.

¹¹ Ylikangas et al., 'Family, State, and Patterns', pp. 84–89, 111–123; Hans Eyvind Næss and Eva Österberg, 'Sanctions, Agreements, Sufferings', in *People Meet the Law*, pp. 148–154; Sølvi Sogner, Marie Lindstedt Cronberg and Hilde Sandvik, 'Women in Court', in *People Meet the Law*, pp. 173–174, 182–185, 190–192; Seppo Aalto, Kenneth Johansson and Erling Sandmo, 'Conflicts and Court Encounters in a State of Ambivalence', in *People Meet the Law*, pp. 204 ff.; Telste, *Mellom liv og lov*, pp. 59–67.

¹² Hans Eyvind Næss, 'Forbrytelse og straff', in *Tingboka som kilde*, ed. by Liv Marthinsen (Oslo: Norsk lokalhistorisk institutt, 1991), p. 31; Terjesen, *Blodskam og leiermål*, p. 37; Bastiansen, 'Væ dig Bergen', p. 25; Jørn Øyrehagen Sunde, *Speculum legale—rettsspejelen: Ein introduksjon til den norske rettskulturen si historie i eit europeisk perspektiv* (Bergen: Fagbokforlaget, 2005), p. 183. See also Næss and Österberg, 'Sanctions', pp. 141–143; Gunnlaugsson, '*Sedlighetsbrott*', p. 112; Eva Österberg and Dag Lindström, *Crime and Social Control in Medieval and Early Modern Swedish Towns* (Uppsala: Almqvist & Wiksell International, Stockholm, 1988), p. 130; Jan Sundin, 'Vårdslig pragmatism och religiöst nit. Om sexualitetens gränser i Sverige 1600–1850', *Historisk Tidsskrift* [Norway] 70 (1991), p. 242.

concentrated on a stricter control of female sexuality than legislation during the medieval period. Regarding criminalisation, it is stressed that women were only considered liable to prosecution in legislation and legal practice after the Reformation.¹³ The deterioration of the legal status of women, a subject discussed by Sølvi Sogner, Marie Lindstedt Cronberg and Hilde Sandvik, is supported by reference to seventeenth-century legislation which states that noblewomen would lose their inheritance if they initiated sexual relations.¹⁴ It is also claimed that the increased importance attached to marriage after the Reformation meant that women who had had pre- or extra-marital sex found themselves in a much more disadvantaged legal position than during the Middle Ages.¹⁵ Sogner, Lindstedt Cronberg and Sandvik refer to Lyndal Roper's *The Holy Household: Women and Morals in Reformation Augsburg* from 1989 to support their claims of a change for the worse for women after the Reformation.¹⁶ Roper's hypothesis, in sum, is that the Reformation was mainly about re-shaping the relationship between the genders, and that changes in sexual crime legislation were used as an important instrument in the defining of the relationship between men and women. In this way Protestantism's new social values led to the attempt to control female sexuality via legislation and the courts.¹⁷

Yet there are more recent studies which question the theory that the Reformation resulted in a deterioration of the legal position of women in regards to sexual crimes. Marjorie McIntosh's comprehensive empirical study *Controlling Misbehavior in England, 1370–1600* from 1998 challenges Roper's thesis.¹⁸ McIntosh finds that English courts dealt with sexual crimes involving both men and women, and that women are not mentioned exclusively in more than a fifth of the cases in any given twenty-year-interval. Also, the percentage of women charged did not increase with early Protestantism or after Puritan ideals were introduced to England. She concludes therefore that English courts were first and

¹³ Telste, *Mellom liv og lov*, pp. 68–69; Bastiansen, 'Væ dig Bergen', pp. 30–34; Næss, 'Forbrytelse og straff', p. 38.

¹⁴ Sogner, Lindstedt Cronberg and Sandvik, 'Women in Court', p. 190.

¹⁵ Terjesen, *Blodskam og leiermål*, pp. 34–37; Sogner, Lindstedt Cronberg and Sandvik, 'Women in Court', p. 182.

¹⁶ Lyndal, Roper, *The Holy Household: Women and Morals in Reformation Augsburg* (Oxford: Clarendon Press, 1989).

¹⁷ Sogner, Lindstedt Cronberg and Sandvik, 'Women in Court', pp. 183, 192.

¹⁸ Marjorie Keniston McIntosh, *Controlling Misbehavior in England, 1370–1600* (Cambridge: Cambridge University Press, 1998), pp. 14–15.

foremost interested in regulating, charging and punishing problematic and illegal sexual behaviour irrespective of gender.¹⁹ McIntosh questions the traditional view that there was a *break* at the time of the Reformation; quite to the contrary she emphasises the *continuity*.

The question of break or continuity is, of course, dependent on which sources one decides to use. In present day research it is normally claimed that medieval legislation including canon law, was revoked after the Reformation, a view that pre-determined which sources were excluded from the analysis a priori.²⁰ Yet this interpretation has not always been undisputed in Norwegian research circles, as Oluf Kolsrud's article 'Kristenret og Kirkeordinants' [Christian Law and Church Decree] from 1917 bears witness to.²¹ Kolsrud documents that in particular *Archbishop Jon's Christian Law* from 1273, translated from Old Norse by Trondheim's second superintendent Hans Gaas in 1559, were diligently copied into the law-books of the post-Reformation sixteenth century.²² The superintendents (after the Reformation introduced as an alternative title for bishops) were highly interested in questions relating to legislation and the application of the law after the Reformation. They apparently did not dismiss the idea of retaining the medieval laws, which to a certain degree were also applied in practice. Parallel to the Church decree of 1539, as Kolsrud notes, the medieval Christian laws were applied in ecclesiastical lawsuits, or in the words of A. Chr. Bang: "Den gamle katolske kristenret havde endnu gyldighed, forsaavidt som dens bud ikke stod i strid med den nye tingenes orden"²³ [The old Catholic Christian law was still valid, as far as its provisions were not at variance with the new order]. Bang was a professor of theology and a minister of the Church, while Kolsrud was the pre-eminent church historian until the late 1940s.²⁴

¹⁹ McIntosh, *Controlling Misbehaviour*, pp. 14–15, 73–74.

²⁰ Næss, 'Trolldomsprosessene', p. 39, notes that new criminal laws were based on the Bible when canon law was abolished in Protestant countries after the Reformation. See also Sunde, *Speculum legale*, p. 249 and Viskum, 'Fortielse og straff', p. 17.

²¹ Oluf Kolsrud, 'Kristenret og Kirkeordinants' in *Den Norske Kirkes Mindeskrift ved Reformationens 400-Aars Jubilæum*, ed. by Oluf Kolsrud (Christiania: Dybwad, 1917), pp. 185–211.

²² Kolsrud, 'Kristenret og Kirkeordinants', p. 197.

²³ A. Chr. Bang, *Den norske Kirkes Historie: I Reformations-Aarhundredet (1536–1600)* (Kristiania: Hjalmar Biglers Forlag, 1895), p. 158 ff., discusses amongst other the fate of the Norwegian Christian laws and their application during the century of the Reformation.

²⁴ Steinar Imsen, 'Nidarosprovinsen', in *Ecclesia Nidrosiensis 1153–1537: søkelys på*

This older Norwegian research represented by Kolsrud and Bang draws conclusions for which support can be found in more recent international research, as in the collection of articles *Canon Law in Protestant Lands* from 1992.²⁵ The focus here is on the fate of canon law after the success of the Protestant Reformation. The research questions are not necessarily new, but as the editor of the collection Richard H. Helmholz underscores: “Too often dramatic events such as Martin Luther’s casting the papal law books into the flames have been as far as historians have looked”.²⁶ This collection of articles does not explicitly discuss sexuality, but it presents more general theses as to why canon law was retained in countries that changed their confession, and how this continuity can be traced. Helmholz argues that earlier generalisations which claim that canon law was pushed aside require substantial modification. A ‘no’ to the pope did not necessarily signify a ‘no’ to canon law, even if the Protestant Reformation dismissed those parts of canon law that elevated the pope’s power within the Church. The quintessential test for whether or not canon law in Lutheran countries could remain was if the canon law was in agreement with God’s word in the Bible. If this important question was answered in the affirmative, it was legitimate to continue to apply traditional Christian law also in countries that refused the pope’s authority.²⁷

In order to comment on the question of continuity or break at the time of the Reformation it is vital to have an overview of the legal situation in the Middle Ages. In Norway, as in the remainder of the North, the study of sexual crimes before the Reformation has been concentrated on the Old Norse period (Iceland and Norway for the period *ca.* 900–1260). The Family Sagas have been at the centre of research, which is why the main focus has also been on Iceland. These studies are less relevant for the present work. By contrast, certain parts of Erik Gunnes’s study on the late twelfth century bishop Eystein, *Erkebiskop Øystein: Statsmann og kirkebygger* from 1996 are highly pertinent. Gunnes argues that Archbishop Eystein modified and rendered older laws relating to marriage and sexuality, and that he also introduced

Nidaroskirkens og Nidarosprovinsens historie, ed. by Steinar Imsen (Trondheim: Tapir, 2003), pp. 26–30.

²⁵ Richard H., Helmholz, *Canon law in Protestant lands, Comparative studies in continental and Anglo-American legal history*, 11 (Berlin: Duncker & Humblot, 1992).

²⁶ Richard H., Helmholz, ‘Introduction’, in *Canon law in Protestant lands*, p. 7.

²⁷ Helmholz, ‘Introduction’, pp. 10–12.

new laws in these areas.²⁸ Hilde Handeland's dissertation on sexuality in Norwegian legislation during the High Middle Ages is also relevant here. Handeland examines which attitudes the legislators had towards sexuality during the period 1100–1300, and concludes that the Church's views influenced the formulation of the Norwegian laws. Only heterosexual relations within marriage and preferably only at certain times were acceptable to the Church.²⁹ From the period 1300–1600 there has been hardly any pertinent Norwegian research done.

Research Questions, Lay-Out, and Terminology

I shall concentrate on three problems. First, I will analyse to which degree the post-Reformation laws against sexual crimes represented new legislation or were based on principles already established by medieval legislation. In connection with the problem of criminalisation the question whether an individual's responsibility for his or her own acts was a product of the new era and the modern state will be addressed. Then I will look more closely at punishment for sexual crimes, comparing the period after the Reformation with the medieval period. Lastly, I will question the view that post-Reformation laws against sexual crimes had particularly negative consequences for women. Both the criminal law sphere—women's liability to prosecution—and the civil law sphere—whether women engaging in sexual relations risked losing their inheritance—will be examined. This last part will conclude with a discussion about the view that as a result of the enhanced status of marriage after the Reformation women who had pre- or extra-marital sex were in a worse position than their medieval counterparts.

I have therefore decided to divide the work into three main parts, one for each of the three main problems: Part A deals with *Criminalisation of Sexual Acts*, Part B with *Punishment*, and Part C with *Gender Equality*. I begin with criminalisation rather than with questions of gender, as is the norm, since the question of whether an act was criminalised or not determines whether it was to be punished, and then also who was to be punished, the man or the woman. Regarding chronology, as mentioned

²⁸ Erik Gunnes, *Erkebiskop Øystein: Statsmann og kirkebygger* (Oslo: H. Aschehoug & Co. (W. Nygaard), 1996), pp. 156–163.

²⁹ Hilde Handeland, 'I lyst og last: Seksualitet i de norske lovene i perioden 1100–1300' (unpublished dissertation (hovedoppgave), University of Oslo, 1997), pp. 1, 112–114.

earlier, medieval historians predominantly concentrated on the Old Norse period, while historians of the Early Modern Period focussed on the years after 1600. By contrast, the focus here is on the period from the mid-1200s until the end of the century of the Reformation. Due to a rather inadequate discussion of the legal situation during large time periods during the Middle Ages and the post-Reformation sixteenth century this project requires a comprehensive empirical study of all existing source material dealing with the legal history of this period. This does not only concern legal practice, but also legislation, since important premises about a *break* during the Reformation are based on assumptions about medieval legislation. Until now, no systematic comparison between laws against sexual crimes before and after the Reformation has been made.

The Sources

A wide range of sources are used here, both laws and sources documenting legal practice (for the period 1300–1600). Before 1300 there is no documentation of legal practice and for the period after 1600 I will comment on several specific studies.

The Laws

In medieval Norway there were four large legal provinces: Gulathing, Frostathing, Eidsivathing and Borgarthing, each of which had its own representative assembly that codified legislation for ecclesiastical as well as secular affairs. In medieval legislation, sexuality is first and foremost regulated by the Christian laws.³⁰ These Christian laws define the population's relationship to Christianity and the Church, they contain rules for the organisation of the Church and they provide guidance for appropriate behaviour in a Christian society.

There are several chronological stages of the Norwegian Christian laws. This work is based on the following classification: the oldest group contains the *Olafstext* in the *Old Christian Law of the Gulathing*,

³⁰ The Christian laws together with other relevant legislation until Olaf Håkonsson's reign (1380–1387) are edited and published in *NgL*. Legislation from the period 1388–1604 is edited and published in *NgL*, 2rk.

together with the older Christian laws of the Eidsivathing and of the Borgarthing which may have been codified in the first half of the eleventh century. In the manuscripts which have been preserved, these laws may contain paragraphs that go back to that time.³¹ It is not easy to determine at which point in time, or by whom, new provisions were introduced to the Norwegian Christian laws. A fortunate exception is the *Old Christian Law of the Gulathing*, where it is specifically indicated which provisions were attributed to King Olaf in the 1020s or King Magnus Erlingsson in the 1160s.³² Tradition holds that Christian laws were originally introduced to western Norway through the initiative of the Anglo-Saxon Bishop Grimkell and King Olaf at an assembly on the island of Moster in Sunnhordland, perhaps in 1022.³³ The *Mosterthing* was probably a consultation meeting between king and bishop to devise more specific Christian rules for the country, then to be presented to the lawthings. And although there are no such explicit references to St Olaf as the initiator of the Christian laws in eastern Norway they may originate from the same period.³⁴

³¹ The dating of the oldest Christian laws will always be open to some debate because the oldest manuscripts in which they are preserved date from around 1200. Concerning the general pattern of surviving legal manuscripts from the Norwegian Middle Ages and Early Modern period; Gustav Storm gives a short description of each manuscript, and where it is to be found in *NgL* IV xiv–xv. The age of a manuscript is reckoned from the time it was started, and including fragments the distribution of a total of 426 manuscripts show that 17 are older than circa 1300 (mostly fragments), 99 between 1300–1400, seven between 1400–1540, 158 between 1540–1610, 11 between 1610–1680, and 134 younger than 1680.

³² Knut Helle, *Gulatinget og Gulatingslova* (Leikanger: Skald, 2001), pp. 17–23. St Olaf brought with him several bishops and priests from England when he became king in 1015, and among them was the Anglo-Saxon bishop Grimkell who is mentioned as co-initiator of the *Olafstext*. The question of whether a Christian law for the Gulathing was already written down during the reign of King Olaf has also been debated. Helle, *Gulatinget*, p. 22 is sceptical of such an early date, but will not rule it out completely, while Knut Robberstad ‘Mostratinget 1024 og Sankt Olavs kristenrett: Etter eit fyre-drag på Moster 28. juli 1974’, *Stensilserie: Institutt for privatrett* (Oslo: Universitetet i Oslo, 1974), pp. 1–26 is more conclusive that a law was actually put on parchment in the 1020s. Such an early date is also supported by Magnus Rindal, ‘Dei eldste norske kristenrettane’ in *Religionsskiftet i Norden. Brytinger mellom nordisk og europeisk kultur 800–1200 e.Kr.*, ed. by Jón Viðar Sigurðsson, Marit Myking and Magnus Rindal (Oslo: Unipub Forlag, 2004), pp. 108–110.

³³ Jan Ragnar Hagland, ‘Kulisteinen: Endå ein gong’ in *Heidersskrift til Nils Hallan på 65-års dagen 13. desember 1991*, ed. by Gulbrand Alhaug, Kristoffer Kurken and Helge Salvesen (Oslo, Novus, 1991), pp. 157–165.

³⁴ Rindal, ‘Dei eldste norske kristenrettane’, pp. 103–134; see conclusion p. 134 in particular; Fridtjov Birkeli, *Tolv vintrer hadde kristendommen vært i Norge* (Oslo: Verbum, 1995), pp. 159–165; Ellen Anne Pedersen, Frans-Arne Stylegar and Per G.

During the early years of Magnus Erlingsson's rule (1161–1184) legal changes were introduced in the *Old Law of the Gulathing*, particularly in the Christian law section. Possibly this revision took place at a meeting in Bergen in 1163 or 1164 in connection with the crowning of King Magnus.³⁵ Most likely a Christian law for the law province of the Frostathing was also codified in the eleventh century, but when the Christian law section in this law was thoroughly revised in the 1170s during Archbishop Eystein's episcopacy (1161–1188) most articles of the older law were abrogated. Unlike in the *Magnustext* (after King Magnus Erlingsson) in the *Old Christian Law of the Gulathing* very little mention has been made of the obsolete rules in the *Old Law of the Frostathing*. Thus in the next time period, from the 1160s and 70s, we have the *Magnustext* of the *Old Christian Law of the Gulathing*, and the *Old Christian Law of the Frostathing*.

The third chronological group consists of the Christian laws of the Gulathing and of the Borgarthing which were codified during King Håkon Håkonsson's reign around 1250. The fourth and last chronological group contains the *Young Christian Law of the Gulathing* revised in 1267, and the Christian laws of the Eidsivathing and of the Borgarthing revised in 1268.³⁶ In addition, Archbishop Jon, nicknamed *Raude* [the Red] issued his own Christian law in 1273.³⁷ Together with Bjørg Dale Spørck, I presented the proposal for a third and fourth chronological stage. The classification presented here differs from the traditional one because since Jens Arup Seip's research from 1937–1942 it has been common to assume that the fourth and last codification of a Christian law, to be precise, of the *Young Christian Law of the Borgarthing II*, was around 1370.³⁸ A few scholars have discussed the problem in recent

Norseng, *Øst for Folden, Østfolds Historie*, vol. 1. (Østfold fylkeskommune, 2003), p. 500. This proposal is based on the fact that several paragraphs have archaic elements: pagan practices are mentioned more frequently and infringements of the law are punished less severely than in other Christian laws. Torgeir Landro, 'Dei eldste norske kristenrettane: Innhold og opphav' (unpublished dissertation (hovedoppgave), University of Bergen, 2005), argues that some paragraphs in the eastern Norwegian Christian laws owe their existence to St Olaf, but that new material was added in the second half of the eleventh century. This revision may have been made by German bishops active in Norway at that time, inspired by the Decretum of the German Bishop Burchard (Bishop of Worms 1000–1025; the Decretum was written ca. 1010–1012).

³⁵ Helle, *Gulatinget*, pp. 17–23.

³⁶ Anne Irene Riisøy and Bjørg Dale Spørck, 'Dateringen av nyere Borgartings kristenretter', *Collegium Medievale* 12 (1999), pp. 57–74.

³⁷ *KL*, XX, p. 300.

³⁸ Jens Arup Seip, 'Ennu en kristenrett fra gammelnorsk tid', *Historisk Tidsskrift*

years; Magnus Rindal finds the thesis presented by Dale Spørck and myself plausible.³⁹ Eldbjørg Haug unequivocally supports Seip's dating, and she argues that Seip is above question until his analysis can be shown to have methodological errors.⁴⁰ However with Seip it is rather a case of lack of a methodology, rather than of methodological errors. He first argues for a dating at the 1340s, but then retreats and proposes the 1370s because this is "naturlig"⁴¹ [natural]. Also the late Grethe Authén Blom considers the 1370s a "rimelig" [reasonable] dating since the Crown then found the time to address the kingdom's internal affairs. As to the question of who was the driving force behind the revision of the *Young Christian Law of the Borgarthing II*, Authén Blom proposes Dean and Chancellor Peter Eiriksson, and she also speculates that the later Archbishop Vinald Henriksson was involved.⁴² The latter is also mentioned by Haug but as the late Lars Hamre points out that while this may be an interesting hypothesis, it cannot be proven.⁴³ Because no new elements have been presented in this debate; I still adhere to my original proposal, that new Christian laws were codified in the mid-thirteenth century and in 1267–1268, and not in the 1370s. When I refer to these laws as a corpus, I will refer to them as the younger Christian laws.⁴⁴

Also throughout the late Middle Ages decrees were issued which were meant to improve and adapt older laws, and there are no prob-

[Norway] 31 (1937–40); Jens Arup Seip, *Sættargjerdene i Tunsberg og kirkens jurisdiksjon* (Oslo: Dybwad, 1942). See the more detailed overview of previous research in Riisøy and Spørck, 'Dateringen', as well as in Anne Irene Riisøy, *Stat og kirke: Rettsutøvelsen i kristenrettsaker mellom Sættargjerdene og reformasjonen* (Oslo: Tingbokprosjektet, 2004), pp. 15–16, 111–114, 117–127, 130–133, 137–140.

³⁹ Rindal, 'Dei eldste norske kristenrettene', pp. 114–115. Cf. Helle, *Gulatinget*, pp. 141, 216.

⁴⁰ Eldbjørg Haug, 'Konkordat-konflikt-privilegium. Sættargjerdene som indikator på forholdet stat-kirke fra Magnus lagabøter til Christen I (1277–1458)' in *Ecclesia Nidrosiensis*, p. 105.

⁴¹ Riisøy and Spørck, 'Dateringen', p. 61.

⁴² Grethe Authén Blom, *Norge i union på 1300-tallet: Kongedømme, politikk, administrasjon og forvaltning 1319–1380* (Trondheim: Tapir, 1992), p. 717.

⁴³ Eldbjørg Haug, *Provincia Nidrosiensis i dronning Margretes unions- og maktpolitikk* (Trondheim: Historisk institutt, NTNU, 1996), p. 99; Lars Hamre, 'Eldbjørg Haug: Provincia Nidrosiensis i dronning Margretes unions- og maktpolitikk', *Historisk Tidsskrift* [Norway] 75 (1996), p. 504.

⁴⁴ For a review of the medieval Norwegian (and also Scandinavian) laws in English, see Per Norseng, 'Law Codes as a Source for Nordic History in the Early Middle Ages', *Scandinavian Journal of History*, 16 (1991), pp. 137–66.

lems concerning the dating of these. A decree was issued in 1478 by the king, with the advice and consent of the Norwegian Council of the Realm, which mainly focuses on sexual crimes, and this is particularly relevant here.⁴⁵

In the Middle Ages, regulations of illicit sexuality were not exclusively prescribed in the Christian laws; they were also dealt with in the secular laws, which primarily shed light on the civil law side of sexuality, including the rules concerning the compensation a (male) lover had to pay to his (female) partner's relatives. For this study, the *Landslaw* of 1274 (adapted to the conditions of the cities with the *Townlaw* two years later) is the most important. With the *Landslaw* legal uniformity was achieved in Norway.⁴⁶ The oldest urban law which is preserved, the *Bjarkeyjarréttr* from Nidaros (present day Trondheim), may have been written down already during Olaf Kyrre's reign (1066–1093), but the various sections were added during different time periods. The *Bjarkeyjarréttr*, hereafter referred to as the *Townlaw from Nidaros*, contains primarily secular law, but also some matters relating to the Christian law sections. This law was applicable before King Magnus Håkonsson's (nicknamed the Law-mender) *Townlaw* came into effect in 1276.⁴⁷ The most pertinent paragraphs of the *Landslaw* found their way into *Kong Christian den Fjerdes norske Lovbog af 1604*, hereafter referred to as the *Norwegian Law of 1604*.⁴⁸

This work also considers medieval penitentials and provincial statutes. Apart from individual entries surviving in some provincial statutes

⁴⁵ The decree of 1478 is published in *NgL*, 2rk, II, pp. 270–271. Lars Hamre, 'Erkebispedømmet i unionstiden', in *Norges nedgang: Senmiddelalderen: norske historikere i utvalg IV*, ed. by Andreas Holmsen and Jarle Simensen, (Oslo: Universitetsforlaget, 1968), pp. 195–196 notes that this decree was issued during Christian I's last visit to Norway. The decree was probably applicable throughout the kingdom, and both the king, the archbishop, all bishops, and the (rest of) the Council of the Realm supported it.

⁴⁶ *Magnus Lagabøters landslov*, ed. and trans. by Absalon Taranger (Kristiania: Cammermeyers boghandel, 1915, repr. Oslo, Bergen: Universitetsforlaget, 1979). The 1979 edition is the fifth; the first appeared in 1915.

⁴⁷ *Bjarkøyretten: Nidaros eldste bylov* ed. and trans. by Jan Ragnar Hagland og Jørn Sandnes (Oslo: Det Norske Samlaget, 1997), pp. x–xl. This law was intended to serve people in town, but also seafarers and traders. Some fragments survive from the thirteenth century.

⁴⁸ *Kong Christian den Fjerdes norske Lovbog af 1604*, ed. by Fr. Hallager and Fr. Brandt (Christiania: Feilberg & Landmark, 1855; repr., Oslo: Norsk historisk kjeldeskrift-institutt, Den rettshistoriske kommisjon, 1981). The reprint of 1981 is a photographed version of the edition of 1855. This law is divided into books and chapters. I will refer to relevant book (in Latin letters) and chapter (in Arabic numerals).

which concern penance, Archbishop Henrik Kalteisen's penitential from the mid-fifteenth century is the only extant from Norway.⁴⁹ Because of the rather limited survival of Norwegian penitentials, Icelandic ones will be considered as well. Since Iceland was part of the church province of Nidaros, this approach is justified.⁵⁰ In the classic account of confession and penance for the medieval Church Province of Nidaros of 1912 Edvard Bull remarks that almost everything in the Icelandic penitentials would also have applied to Norway.⁵¹ The oldest preserved penitential is the Icelandic Bishop Thórlákr Thórhallsson of Skálholt's, which may possibly date to his incumbency (1178–93).⁵² This penitential primarily focuses on heterosexual relations; Icelandic chieftains had a reputation for ignoring Christian moral teachings on this point. A number of provincial and synodal statutes survive from the Church province of Nidaros, mainly from the thirteenth and the first half of the fourteenth century. Amongst other things, provincial statutes were a means for the Church to denounce circumstances it was displeased with—including problems relating to sexuality—and to propose which changes or even sanctions should be introduced.

Several laws of relevance for this study were promulgated after the Reformation. On 2 September 1537 Christian III ratified a Church decree in Latin, which with minor changes was translated into Danish two years later.⁵³ For Norway, this decree of 1539 was intended to be merely an interim regulation. The king and the superintendents, nominated by the king to replace the Catholic bishops, were to deliberate and to decide on

⁴⁹ *Erkebiskop Henrik Kalteisens Kopibog*, ed. by Alexander Bugge (Christiania: Det Norske Historiske Kildeskriftfond, 1899).

⁵⁰ With the establishment of the archdiocese of Nidaros in the mid-twelfth century, this province comprised the dioceses of Bergen, Stavanger, Hamar and Oslo in Norway. The archbishop had his seat in Nidaros, present day Trondheim. The archdiocese of Nidaros also comprised Skálholt and Hólar in Iceland, Gardar on Greenland, and Sodor which included the Faroes, the Orkneys and the western Isles of Scotland. In 1272/1273 the dioceses of the Orkneys and the Hebrides were formally transferred to the Scottish archdiocese of St. Andrews.

⁵¹ Edvard Bull, *Folk og kirke i middelalderen: Studier til Norges historie* (Kristiania and Kjøbenhavn: Gyldendalske Boghandel Nordisk Forlag, 1912), p. 103.

⁵² Sveinbjörn Rafnsson, 'The Penitential of St. Torlakur in its Icelandic context', *Bulletin of Medieval Canon Law*, New Series, 15 (1985).

⁵³ Amongst other, the church decree enjoined rules regarding faith, choice of ecclesiastical personnel, and moral conduct. The church decrees of 1539 and 1537 are for example published in *Kirkeordinansen 1537/39: Det danske Udkast til Kirkeordinansen (1537); Ordinatio Ecclesiastica Regnorum Danie et Norwegie et Ducatum Sleswicensis Holstatiæ etc. (1537); Den danske Kirkeordinans (1539)*, ed. by Martin Schwarz Lausten (København: Akademisk Forlag, 1989).

what would be suitable for Norway. However, Christian III never came to Norway, and it was only on 1 July 1607 that a Norwegian Church decree was issued.⁵⁴ Some of the laws issued in the period between these two decrees applied to both Denmark and Norway, such as the *Ribe Articles* of 1542 and *Den Koldingske Reces* of 1558.⁵⁵ Others only applied to a more limited area. An example of the latter is a decision made by the Oslo town council in 1575 that all “loose women” who lay with married men should, if caught for the second time, lose their skin and leave the country.⁵⁶ Also, during the early seventeenth century a number of decrees on incest were issued.⁵⁷ A *Forordning om Løsagtighed* hereafter referred to as the *Ordinance against loose living* from 1617 was concerned with rules on the sexual relations of unmarried people.⁵⁸ Christian IV’s legislative activity culminated in the *Store Recess* [Great Decree] of 1643, containing a systematic collection of the legislation.⁵⁹ In addition, *Kong Christian den Femtes Norske Lov af 15de April 1687*, hereafter referred to as the *Norwegian Law* of 1687, regulates illegal sexuality in a very comprehensive manner.⁶⁰

Evidence of Legal Practice

This study considers all sources from the whole of Norway during the period 1300 until 1600 which document the legal practice. To facilitate the analysis, all cases concerned with illicit sexuality are categorised. Most cases provide information concerning the criminal aspects (96

⁵⁴ Kolsrud, ‘Kristenret og Kirkeordinants’, pp. 189–190, 193, 199–205.

⁵⁵ *The Ribe Articles* are published in *Danske Kirkelove: Samt Udvalg af andre Bestemmelser vedrørende Kirken, Skolen og de Fattiges Forsørgelse fra Reformationen indtil Christian V’ Danske Lov, 1536–1683*, ed. by Holger Fr. Rørdam, 3 vols (København: Selskabet for Danmarks Kirkehistorie, 1883–1889), vol. 1, pp. 195 ff.

Den Koldingske Reces is published in *Forordninger, Recesser og andre kongelige Breve, Danmarks lovgivning vedkommende: 1558–1660* ed. by V. A. Secher, 6 vols (København: Klein, 1887–1918), vol. 1, p. 1 ff.

⁵⁶ *Nils Stubbs Optegnelserbøger fra Oslo Lagthing 1572–1580*, ed. by H. J. Huitfeldt-Kaas (Christiania: J. Chr. Gundersens Bogtrykkeri; repr. 1982), p. 90.

⁵⁷ Terjesen, *Blodskam og leiermål*, pp. 92–103 for an overview.

⁵⁸ *Danske Kirkelove*, vol. III, p. 62.

⁵⁹ *Christian den fjerdes recess 1643* (Oslo: Den rettshistoriske kommisjon, 1981).

⁶⁰ *Kong Christian den Femtes Norske Lov: 15de april 1687: Med Kongeloven 1665* (Oslo: Universitetsforlaget, 1982). This law is divided into books, chapters and paragraphs. In particular book VI, *Om Misgierninger* [concerning crimes/misdeeds], chapter 13 *Om Løsagtighed* [concerning loose living] is of relevance here. I will refer to relevant book, chapter and paragraph in Arabic numerals.

Table 1. Cases in the period 1300–1600.

Categories of Crimes	Middle Ages		1537–1600	
	Numbers	%	Numbers	%
Adultery	38	40	180	24
Fornication	18	19	498	65
Prostitution	0	0	18	2
Incest	19	20	43	6
Rape	3	3	10	1
Sodomy	2	2	1	0
Unspecified sexual crimes	10	10	10	1
Sexual and other crimes	6	6	6	1
Total	96	100	768	100

cases from the Middle Ages and 768 from the post-Reformation sixteenth century), and I have briefly defined the use of the terms adultery, fornication, incest, rape and sodomy. A short definition of the civil law aspect of sexuality will follow. Below is an overview of the number of relevant criminal cases during the period 1300–1600.

The category adultery, which in research literature is often synonymous with whoring, comprises the following sub-categories: simple adultery (one married and one unmarried partner), double adultery (two married partners), and people who “ran away” (the unfaithful partner has left his/her spouse).

Fornication is the super ordinate term denoting sexual relations between an unmarried man and an unmarried woman. In seventeenth century studies there are usually two sub-categories, depending on whether or not a marriage later follows the sexual relations. Consequently, the terms “fornication without ensuing marriage” and “fornication with ensuing marriage” are used here respectively.⁶¹ It is often impossible to decide to what extent different terms for fornication (the sources from the period 1300–1600 give amongst other *leyer*, *leiermål*, *frillelevnet*, *skjørlevnet* and *mørett*) indicate specific legal categories. The amount of the fine is also not a reliable guideline. Consequently, all offences involving two unmarried partners shall be subsumed into the category fornication.

⁶¹ Bastiansen, ‘Væ dig Bergen’, p. 11; Telste, *Mellom liv og lov*, pp. 84–86.

In this work incest is understood to mean unlawful sexual relations between relatives, either biological kinship or affinity (*sifjaðr*).⁶² Some studies use terms like “blood dishonour” and “fornication within forbidden degrees” in order to distinguish between incest amongst close relatives which could lead to the death penalty, and that among distant relatives which usually only required the payment of fines.⁶³ This distinction is not necessarily clear, for one reason because the definition of which degree of kinship warranted the death penalty underwent some changes throughout the centuries. To avoid any confusion here, I shall consistently use the term incest. During the Middle Ages so-called spiritual kinship also applied. Spiritual kinship, *guðsifjar*, was established by baptism; between first and foremost the child and those participating in the christening, but also between the latter and the child’s parents. The Christian laws note all such spiritual relations.

In addition, there is documentation of cases concerning prostitution and rape (which in contemporary legislation is defined as a man forcing a woman to carry out sexual acts). Sodomy includes homosexuality (sexual relations between men) and bestiality (sexual relations between a man and an animal). During the Middle Ages sexual abstinence was required on specific days, and Handeland calculates that their total number amounted to approximately two hundred.⁶⁴ I have not come across any cases in this category in the court records, and therefore it is difficult to say to what extent this rule was applied in medieval Norway.

Illicit sexuality also had important civil law aspects. The lover of a woman, regardless of whether the woman was unmarried or married, had to pay compensation to her closest relatives. From the period 1300–1600 I have found 35 such cases. In addition, women who initiated an illegitimate sexual relationship or who married without obtaining their guardian’s consent risked losing their inheritance to their closest relative. Seven such cases have been preserved.

A wide range of sources document legal practice and a short overview are presented below in table 2.

⁶² *NgL*, V, p. 553, *sifjaðr*.

⁶³ For instance Terjesen, *Blodskam og leiermål*, pp. 4, 92.

⁶⁴ Handeland, ‘I lyst og last’, p. 16.

Table 2. Overview of sources according to period and place.

Sources	Period	Place
Diplomas	1300–1600	Whole country
Rental books	1430–1450	Mainly Trøndelag
Account rolls of fiefs	1520–1600	Whole country
Protocols of lawthings	1570–1580; 1590–1600	Oslo, Bergen
Stavanger Cathedral Chapter	1570–1600	Stavanger
Protocol of the <i>Herredag</i>	1578–1600	Oslo/Trondheim

The only category amongst the sources which covers the entire period 1300–1600 is diplomas. The vast majority of the diplomas until 1570 are published in *Diplomatarium Norvegicum*,⁶⁵ and they are also accessible on the Internet.⁶⁶ Unpublished diplomas, mainly from the period after 1570 which are included in this study are transcribed, and these transcriptions are in *The National Archives of Norway* in Oslo. Also the originals are for the most part to be found there. Diplomas give a relatively full description of the legal processes from accusation and questioning to witnesses' statements and the final conclusion of the case with a verdict of guilty or not guilty. In case of the former, *sáttmál* [public settlement] was the norm, but formal judgement was also possible. The term public settlement for *sáttmál*, corresponding to the post-Reformation term *sone*, is used to denote a legal settlement involving the public prosecution. The matter was dealt with amicably. Public authorities had a claim to fines, and, in essence, the culprit paid directly to the public prosecutor without having to involve the *þing* assemblies for an official judgement.

Also ecclesiastical rental books, especially *Aslak Bolts Jordebok*, drawn up by Archbishop Aslak Bolt in the 1430s, provide information concerning sexual crimes. It is sometimes noted why the Church acquired

⁶⁵ *Diplomatarium Norvegicum: Oldbreve til kundskab om Norges indre og ydre forhold, sprog, slægter, sæder, lovgivning og rettergang i middelalderen* (Christiania/Oslo, 1847–) If known, it will be noted how the diplomas have survived and which collections they had been or were part of. They will be referred to as DN, followed by the number of the volume (in Latin letters) and the Arabic number of the individual diploma. *Regesta Norvegica* (Oslo, 1989–) presents in chronological order an inventory regarding all known letter and documents concerning Norway and Norwegians during the middle ages. A short summary of content and information about dating, where it was issued and by whom, is also presented. *Regesta Norvegica* will be referred to as *RegNorv*, followed by the Latin number of the volume.

⁶⁶ http://www.dokpro.uio.no/dipl_norv/diplom_felt.html (30.03.2006).

a property. This was not only because of pious gifts and purchases, but also because properties were transferred in place of fines when the Christian laws had been broken, for example because the previous owners had been guilty of adultery or incest.⁶⁷

The registers of fines in the account rolls of the various fiefs (*len*), in which the majority of sexual crimes are recorded, contain a short list of fines collected, usually with information on who paid, how much and for which offence. Almost all medieval account rolls showing royal revenues in fiefs or stewardships (*sýsla*, the land granted to the king's *sýslumaðr* in the Middle Ages) have been lost; the few surviving ones are published in *Norske Regnskaber og Jordebøger*.⁶⁸ The account rolls from the post-Reformation sixteenth century before 1570 are published in *Norske Lensrekneskapsbøger*.⁶⁹ Unpublished registers of fines from account rolls from the period 1570–1600, also discussed in this study, can be found on microfiche in the *National Archive* in Oslo.⁷⁰

Also protocols from the intermediate lawthings, the regional court assemblies, extant from Oslo from the 1570s⁷¹ and Bergen from the 1590s,⁷² contain information on sexual crimes. Amongst the protocols of cathedral chapters, Stavanger Cathedral is the oldest and the only one from the sixteenth century (it begins in 1571).⁷³ Protocols from the *Herredag* (the highest court in the kingdom, made up of the King and

⁶⁷ In the Middle Ages, the Crown, ecclesiastical institutions, and private landlords had rental books, some of which are still extant—mostly those from ecclesiastical institutions. *Aslak Bolts Jordebok*, ed. by Jon Gunnar Jørgensen (Oslo: Riksarkivet, 1997). I have also found two cases in *Olav Engelbrektssøns jordebog: register paa St. Olavs jorder, forfattet under erkebiskop Olav Engelbrektssøn; Anhang: Erkebiskop Gautes jordebøger*, ed. by Chr. Brinchmann and Johan Agerholt (Oslo: Nationaltrykkeriet, 1926), pp. 90–91.

⁶⁸ *Norske Regnskaber og Jordebøger fra det 16de Aarhundrede* ed. by H. J. Huitfeldt-Kaas and others, 5 vols, (Christiania: Det Norske historiske Kildeskriftfond, 1887–). For general information about these sources see *KL*, XI, 115f.

⁶⁹ *Norske Lensrekneskapsbøger 1548–1567*, ed. by Asgaut Steinnes and others, 7 vols (Oslo: Jacob Dybwad, 1937–). References to cases from these registers of fines in the account rolls will be followed by the Latin number of the volume.

⁷⁰ See the following catalogues of archives for an overview of existing account rolls: *Lensrekneskaper I: Austlandet* (Oslo: Riksarkivet, 1982) and *Lensrekneskaper II: Agder, Vestlandet, Trøndelag, Nord-Noreg. Tillegg: Rekneskaper og Jordebøger eldre enn 1570* (Oslo: Riksarkivet, 1983).

⁷¹ *Nils Stubbs*.

⁷² These sources are unpublished, but accessible on the internet: <http://www.digitalarkivet.uib.no/sab/raadstu1.htm>; <http://www.digitalarkivet.uib.no/sab/raadstu2.htm>; <http://www.digitalarkivet.uib.no/sab/raadstu3.htm>

⁷³ *Stavanger domkapitels protokol: 1571–1630*. vol. I, ed. by Andreas Brandrud (Christiania: Thronsen, 1897). The *Ribe Articles* prescribed that cathedral chapters were to serve as courts for matrimonial cases as well as other types of cases.

the Council of the Realm) are also relevant. Beginning in 1578, they continue until the early 1660s, and are published in the series *Norske Herredagsdombøger*.⁷⁴

Sporadically, sexual acts which were against the law are also mentioned in other sources such as Absalon Pederssøn's diary from Bergen, which covers a period of twenty years beginning in 1552,⁷⁵ notes on visitations made by Jens Nilssøn, superintendent for the dioceses of Oslo and Hamar in the late sixteenth century,⁷⁶ and the *Norske Rigs-Registranter* containing legislation and decisions made by the Danish-Norwegian kings.⁷⁷

It is crucial to be aware that before the seventeenth century, and even more so before the sixteenth century, it is purely accidental which sources have survived and which have not, as well as from which areas of the country they hail. An example which illustrates this point is a diploma from 1291, providing the information that fines for adultery were collected in Trondenes, in northern Norway—probably in the name of the archbishop.⁷⁸ After this, there is no further surviving trace of public prosecution of sexual crimes in this part of the country for one-and-a-half centuries. During the 1430s–1450 the *Aslak Bolt's Jordebok* lists 3 cases of adultery and 2 cases of incest, which is again followed by a long period devoid of surviving sources.⁷⁹ In 1567 however, the surviving evidence bursts onto the scene with a remarkable 139 cases

⁷⁴ *Norske Herredags-Dombøge*, Første Række, (1578–1604), udgivne for Det Norske Historiske Kildeskriftfond, ed. by E. A. Thomle, 6 vols (Christiania: Thronsen & Co.s Bogtrykkeri, 1893–1903). References in the footnotes will indicate volume by Latin number. When the king and the Council of the Realm sat together during meetings (called *Herredag* in Denmark in the sixteenth and the first part of the seventeenth century), they were the highest court in the kingdom. For more information see Steinar Imsen and Harald Winge, *Norsk historisk leksikon: Kultur og samfunn ca. 1500–ca. 1800*. 2nd. ed. (Oslo: Cappelen akademisk forlag, 1999), pp. 158–159, 344–345 “Herredag” and “Retterting”.

⁷⁵ *Absalon Pederssøns dagbog over begivenheder især i Bergen 1552–1572*, ed. by N. Nicolaysen (Christiania: Johan Dahls Forlag, 1860).

⁷⁶ *Biskop Jens Nilssøns visitatsbøger og reiseoptegnelser 1574–1597*, ed. by Yngvar Nielsen, (Kristiania: A. W. Brøgger, 1885).

⁷⁷ *Norske Rigs-Registranter: Tildeels i Udrag*, 12 vols (Christiania, 1861–1891). References to cases from *Norske Rigs-Registranter* will be followed by the Latin number of the volume.

⁷⁸ DN, III, no. 30, pp. 29–31. We do not know here whether this concerned one or several cases, and this record is not included in the table on cases of adultery.

⁷⁹ *Aslak Bolt's Jordebok*, pp. 152, 165, 157 (adultery); 153, 159 (incest) from Hålogaland.

(including adultery, fornication and incest) noted in the registers of fines in the account rolls of the fiefs of Northern Norway.⁸⁰

The total number of cases of sexual crimes from the post-Reformation sixteenth century, including all parts of the country, is 768. The fact that 139 of these 768 cases are recorded from northern Norway, all from one year, and all from merely one group of sources, provides a good indication that an immense number of sources which could have borne witness to the legal situation between the Reformation and the year 1600 have been lost. This is most likely also true for the preceding centuries. Yet again, *Aslak Bolt's Jordebok* can be used to illustrate this methodological point. I counted 3 cases of adultery noted in this source. Even including the whole country, for this 20-year period 1430s–1450 I merely find one other similar case, from Vestfold (in South-Eastern Norway) in 1446.⁸¹

Lastly and shortly: in this work, personal and place-names are given in their normalised form. I have relied on the proper names in the recent *The Cambridge History of Scandinavia* I.⁸²

⁸⁰ These are predominantly found in *NLR*, V, pp. 230–236 (Finnmark, Troms, Senja, and Salten).

⁸¹ *DN*, IX, no. 297, p. 276.

⁸² *The Cambridge History of Scandinavia*, vol. I, ed. by Knut Helle (Cambridge: Cambridge University Press, 2003).

PART A

CRIMINALISATION OF SEXUAL ACTS

The claim that sexual acts were more and more criminalised after the Reformation has been made especially with regard to fornication, adultery, and prostitution. The discussion is linked to the question of individual criminal responsibility. Many historians would argue that these phenomena are a product of the post-Reformation state. Individual liability to prosecution has also been linked to the understanding of sin, which in the Christian tradition is what separates people from God. It has been claimed that after the Reformation, acts which went against the teachings of the Bible were defined as sinful, and therefore criminalised. Otherwise, if the sin went unpunished, God's punishment might hit society as a whole.¹ It has also been proposed that before the Reformation, fornication and adultery merely resulted in civil law consequences. These cases would have been characterised as private disagreements. They were to be solved by the involved parties and the main question would have concerned the compensation to be paid to the insulted party. The fact that these cases also involved the ecclesiastical jurisdiction, in other words, fines were also paid to the Church, is frequently not mentioned. Another common view is that Church and Crown tacitly accepted prostitution during the Middle Ages. Early Modern scholars propose that these types of extramarital sexual relations were criminalised after the Reformation firstly, because of a need to protect marriage—and the patriarchal household which the Lutheran authorities considered the very linchpin of society—and secondly, due to the desire to expand the state's monopoly on criminal prosecution.²

¹ Næss and Österberg, 'Sanctions', pp. 141–142; Terjesen, *Blodskam og leiermål*, pp. 22–23; Gunnlaugsson, 'Sedlighetsbrott', p. 112; Jan Sundin, 'Värdsilig pragmatism och religiöst nit. Om sexualitetens gränser i Sverige 1600–1850', *Historisk Tidsskrift* [Norway] 70 (1991), p. 242; Bastiansen, 'Væ dig Bergen', pp. 25–28; Sunde, *Speculum legale*, p. 183.

² See for instance Sogner, Lindstedt Cronberg and Sandvik, 'Women in Court', p. 183.

The following two chapters discuss the relationship between tradition and innovation in legislation against sexual crimes during the period 1537–1687. It is my hypothesis that this legislation, to a great extent, continues to apply medieval principles when deciding which sexual acts should be criminalised. Furthermore, individual liability to prosecution was recognised long before the Reformation; it already appears in our oldest Christian laws, possibly codified in the eleventh century, and it is closely linked to the concept of sin.

CHAPTER ONE

NEW LAWS, OLD PRINCIPLES

This chapter aims to show that, in general, laws issued against sexual crimes after the Reformation to a very large degree follow principles which had been defined already by medieval legislation. Apart from the relevant laws we shall also consider evidence from legal practice.¹

Adultery

The stipulation from the *Landslaw* that the lover of a married woman had to pay compensation to her closest family was also found in the *Norwegian Law* of 1604.² The continuity in the legislation concerning the civil law aspect is obvious. The question is when public authorities defined adultery as a crime.

After the Reformation, legislation from Christian III's *Odenseske Reces* [Decree of Odense] of 1539 to that of the *Norwegian Law* of 1687 makes it quite clear that adultery was a serious crime.³ The following case however, dating in the early fifteenth century, undermines the common assumption that in the Middle Ages adultery was a problem solved exclusively between the involved parties, the lover and the cuckolded husband.⁴ In 1405 Haldor Roarsson from Gudbrandsdalen in southern

¹ See Introduction Table 1. Cases in the period 1300–1600, which gives an overview of the number of relevant cases.

² L IV 5 cf L IV 27 (25b), *NgL*, II, pp. 52, 71–72, *Magnus Lagabøters landslov*, pp. 47, 68; *Kong Christian den Fjerdes norske Lovbog af 1604*, III 22, p. 65.

³ *Danske Kirkelove*, vol. 1, p. 135 § 3. This *recess*, issued at a *Herredag* at Odense in 1539 with the king and the Council of the Realm in attendance, was in all probability also applicable in Norway. It was continued by a *recess* of 1547 and by the *Koldingske Recess* of 1558. According to V. A. Secher in *Forordninger, Recesser og andre kongelige Breve*, vol. 1, pp. 40–41 the section of the *recess* of 1539 § 3 is based on *reces* 1537 §§ 8, 9) i.e. Christian III's *Anden kjøbenhavnske Reces* ("Second Decree of Copenhagen") of 1537. (As we shall see in the Part B, this in turn is based on a fifteenth-century Danish town law.) A similar rule is also found in *Kong Christian den Femtes Norske Lov: 15de april 1687*, 6–13–25, pp. 256–257.

⁴ See for example Telste, *Mellom liv og lov*, pp. 59–68; Terjesen, *Blodskam og leiermål*, p. 37. More detailed discussion in the following sub-chapter, also including further studies.

Norway had a relationship with a married woman.⁵ Not surprisingly, Haldor had to pay compensation to the woman's husband, in agreement with the *Landlaw*, which in this case amounted to an astonishing thirty cows.⁶ Yet in addition, Haldor had to pay a fine to a royal steward, (*konongs vmbodezs man*), who took part in the negotiations for the settlement between the culprit and the injured party. What was the legal basis for the authorities to also punish Haldor with a fine?

The *Old Christian Law of the Frostathing* III § 5 "Concerning adultery" gives a short definition of the crime: either a married man had sexual relations with a woman other than his wife, or a married woman had sexual relations with a man other than her husband.⁷ It is possible that this stipulation was already added with Archbishop Eystein's late twelfth century revision.⁸ In this context, a look at contemporary Iceland is worthwhile. Bishop Thórlákr of Skálholt decrees penance for adultery, and a distinction between simple and double adultery is applied. There is a more severe penance for sexual relations between two (otherwise) married people—eight years—as opposed to seven years in cases of one married and one unmarried part.⁹ This distinction between simple and double adultery can be found again in the younger Christian laws which stipulate fines to be paid to the bishop for this crime. The *Young Christian Law of the Borgarthing*, NB II adds that in such a serious case as double adultery, sin, confession and fines were to be increased twofold.¹⁰

The younger Christian laws, the *Landslaw* of 1274 and the decree of 1478 also deal people who "ran away" (*brot laupa*) and where the unfaithful spouse in all likelihood intended to establish a new household with

⁵ DN, V, no. 445, pp. 316–317. Three years later it was confirmed that Haldor had paid the fine and the compensation, DN, III, no. 590, pp. 429–430.

⁶ L IV 5, and L IV 30 (29), (NgL, II, pp. 52, 71–72), *Magnus Lagabøters landslov*, pp. 47, 70.

⁷ NgL, I, p. 149. A translation is found in *The Earliest Norwegian Laws: Being the Gulathing Law and the Frostathing Law*, trans. by Laurence M. Larson, Records of Civilization Sources and Studies, 20 (New York: Columbia University Press, 1935), pp. 247–248.

⁸ Gunnes, *Erkebiskop Øystein*, p. 160.

⁹ DI I, no. 43, pp. 237–244. Bishop Thórlákr was consecrated in 1178 and died in 1193. Rafnsson, 'The Penitential of St. Torlakur', pp. 25–26, Bull, *Folk og kirke i middelalderen*, pp. 119–120. Article 18 of the penitential decrees that the penance also applies to women committing the crime.

¹⁰ NB II § 22, (NgL, IV, p. 173); NB § 18, (NgL, II, p. 301); NG § 26, (NgL, II, p. 320); J § 44, (NgL, II, p. 371). See appendix 1.

his or her new partner.¹¹ Within the medieval categorisation of sexual crimes, leaving one's spouse was a more serious affront to marriage as a sacrament than was short-lived infidelity. Moreover, this regulation may also refer back to the late twelfth century prohibition against the abduction of women.¹² A new ordinance introduced in the *Old Christian Law of the Gulathing* in 1163/64 decrees permanent outlawry for "men who take women by violence or [carry off] other men's wives or their betrothed, or their daughters without the consent of those who have authority over them".¹³ Whatever the woman's attitude may have been, the legislators stressed that she had been abducted without the consent of her husband, father or guardian.¹⁴ As Handeland points out, it is difficult to give a precise definition of abduction of women, because the women herself may not always have been entirely unwilling.¹⁵ While the late twelfth century paragraph uses the term "taca med rane", the term *rán* was used about all kinds of violations of other people's rights, the thirteenth century legislation uses the term *brot laupa* (or run away) which implies that the woman may have taken a more active part. Still, a husband may not have approved.

These factors would explain the far harsher sanctions—outlawry which included the loss of all property and which stands in contrast to fines which were prescribed in cases of simple and double adultery. Stipulations on adulterers who ran away were taken up by the *Norwegian Laws* of 1604 and 1687.¹⁶ It is obvious that adultery was a sinful act requiring penance, as well as a criminal deed requiring the payment of fines. The claim that adultery was only criminalised after the Reformation can therefore not be upheld. The fact that fines for adultery sometimes ended up in the king's or his officials' pockets instead of going to the bishop as was prescribed, does not change the fact that different forms of adultery were criminalised during the High Middle Ages.¹⁷

¹¹ NG § 29, (NgL, II, p. 322); NB § 20, (NgL, II, p. 302); NB II § 24, (NgL, IV, p. 174); L IV 3, (NgL, II, p. 51), *Magnus Lagabøters landslov*, p. 45.

¹² Gunnes, *Erkebiskop Øystein*, p. 161; Handeland, 'I lyst og last', pp. 103–108.

¹³ G § 32, (NgL, I, pp. 19–20), *The Earliest Norwegian Laws*, p. 59.

¹⁴ See also Kirsti Lyngvær, 'Kvinner og vold: En undersøkelse av norske middelalderlover' (unpublished dissertation (hovedoppgave), University of Oslo, 1996), p. 107.

¹⁵ Handeland, 'I lyst og last', p. 104.

¹⁶ *Kong Christian den Fjerdes norske Lovbog af 1604*, III 2, p. 42. According to *Kong Christian den Femtes Norske Lov: 15de april 1687*, 6–13–22, p. 256, they should "miste Livet" [lose their lives] also the married woman if she eloped voluntarily.

¹⁷ A recurrent struggle between the kingdom and the Church in the Middle Ages

It is impossible to quantify the number of cases of adultery brought before the public courts, but it is clear that Haldor's case from the early fifteenth century is not exceptional. The oldest evidence I found which shows that adultery was a public concern also in practice is a document from 1291. In this document, Archbishop Jørund announces that he has summoned Bjarne Erlingsson of Giske in Sunnmøre to appear before the archiepiscopal court at Nidaros. Among other things, Bjarne Erlingsson was accused of having forced the priest Audun of Trondenes to relinquish to him fines collected for adultery. Audun had done as ordered; we read that "sua var gort".¹⁸

From the Middle Ages, 38 cases of adultery are documented, while from post-Reformation sixteenth century we know of 180. These numbers include unspecified adultery, simple and double adultery, and adulterers who eloped. In short, different forms of adultery were clearly criminalised both before and after the Reformation but what was the situation regarding sexual relations between two unmarried people?

Fornication

According to the *Landslaw* the lover of an unmarried woman had to pay compensation (*lagrettr*) to her closest family.¹⁹ A similar stipulation was also found in the *Norwegian Law* of 1604.²⁰ This was replaced by

was the control of the administration of justice in cases under Christian law, and those able to collect fines enhanced their political powers as well as their economic strength. In 1392 a governmental edict applying to the whole country stated that all fines in cases of outlawry under Christian law were to be equally divided between king and bishop. *NgL*, 2rk, I, pp. 22–26. Lesser violations of the Christian laws were to be punished by fines (three marks and below) of which the bishop, according to *all* the Christian laws, was fully entitled. Although the king's lawful right to fines was limited to cases of outlawry, cases concerning various sexual offences demonstrate that the Church was not sole collector of the lesser fines. Riisøy, *Stat og kirke*, pp. 112–115.

¹⁸ *DN*, III, no. 30, p. 29. We do not know whether this concerns one or more cases, and this example is not included in the number of cases of adultery. Bjarne Erlingsson (c. 1250–1313) was the richest and most distinguished man in his time, and from 1273 he participated in all of the most politically important events. Bjarne Erlingsson had already earlier shown great interest in cases under Christian laws, as is discussed by Knut Helle, *Konge og gode menn i norsk riksstyring ca. 1150–1319* (Bergen: Universitetsforlaget, 1972), p. 576. At an assembly at Vågan in the Lofoten in 1282 Bjarne Erlingsson ordered that the lawman was to pronounce sentence based on the Christian laws in the same way as he did on the *Landslaw*.

¹⁹ L IV 30 (29), (*NgL*, II, p. 72), *Magnus Lagabøters landslov*, pp. 70–71.

²⁰ *Kong Christian den Fjerdes norske Lovbog af 1604*, III 25 "möers og quinders

the *Norwegian Law* of 1687, but which also contains rules for compensation.²¹

An important question is when fornication was defined as a criminal offence and treated as such in legal practice, because it has been claimed that the criminalisation of fornication was a post-Reformation phenomenon. In support of this view, the *Ordinance against loose living* of 1617 is frequently quoted.²² This legislation however, had older precedents. The precursor of the provision on fornication was the *Koldingske Reces* of 1558, which in turn takes up corresponding stipulations from the *Odenseske Reces* of 1539. According to section 60 of the *Koldingske Reces* a violator of virgins (*jomfrukrenker*) shall pay compensation to the woman's guardian as well as a fine to the king.²³ As can be seen, one and the same section contains both civil and penal law aspects, compensation to the woman's guardian, and a fine to the authorities (the king), respectively. I shall discuss in Part B that these rules were also applied in practice, as evidenced by the collection of fines.

Regarding the question as to why fornication was criminalised after the Reformation, Hilde Sandvik's views are representative of many scholars' thoughts on the matter.²⁴ Firstly, Sandvik argues that the Reformation led to a clear break in the legal situation in the Nordic countries. Then she compares the North to the rest of Europe and claims that the system of state churches in the Nordic countries favours a criminalisation of acts which did not happen in other countries where these acts are regarded as sins and remained exclusively a moral problem. However, as I shall discuss in Chapter 2, *Individual Criminal Responsibility*, already our oldest laws on sexual crimes express a close connection between sin and crime.

beliggels", pp. 67–68, which in footnote 1 p. 67 refer to the *Landslaw* as the precursor of this paragraph.

²¹ If a man asks for a woman in marriage and sleeps with her before they are betrothed, and the girl's guardians will not consent to marriage, the man ought to pay the woman a dowry; and if a man sleeps with a girl or widow of unblemished reputation (*uberøgtet*); if the girl cannot prove it, the man can clear himself with his oath. *Kong Christian den Femtes Norske Lov: 15de april 1687*, 6–13–4 and 6–13–5, p. 254.

²² Sogner, Sølvli, *Krig og fred: 1660–1780, Aschehougs Norges Historie*, vol. 6 (Oslo: Aschehoug, 1996), p. 99. *Danske Kirkelove*, vol. 3, p. 62.

²³ V. A. Secher in *Forordninger, Recesser og andre kongelige Breve*, vol. 1, p. notes decrees of 1547 § 42, 1539 § 3 and 1537 §§ 8, 9 as precursors of § 60 "Om hoersag och jomfrukrenkere" in the *Koldingske Reces*. *The ordinance against loose living of 1617, Danske Kirkelove*, vol. 3, p. 62.

²⁴ Sandvik, 'Tidlig moderne', pp. 121–122. Cf for instance Telste, *Mellom liv og lov*, pp. 63, 68–69.

James A. Brundage, the great authority on *Law, Sex and Christian Society*, points out that the thirteenth century was a watershed regarding the Church's view on fornication.²⁵ Taking the example of an English provincial statute issued between 1238 and 1244, Brundage shows how legislators attempted to implement the prohibition against sexual relations between two unmarried people by introducing procedures for the systematic reporting of such acts. The parish priest had to report to the dean, and the dean to the archdeacon, who was in rank just below the bishop. It was the archdeacon's responsibility to decide whether the accusations were serious. In such cases, canonists strove to formalise the relationship with marriage; punishment in the form of a fine, a whipping (usually only in cases of insolvency) and penance was also an option. Brundage also describes how secular authorities, especially in towns, introduced punishments for men who had lain with unmarried women of higher social status. This development became more pronounced throughout the following centuries. In medieval Europe fornication was treated by the civil law, in that the woman's family could claim compensation. It was also considered a sinful act which had to be atoned for through confession. Fornication was also a criminal act which was punished by fines or whipping under public authority—and the latter could be either ecclesiastical or secular.²⁶ The question here is whether the situation in medieval Norway differed from that in Europe regarding the last point, whether or not fornication was considered a crime.

Indeed, it appears that already the *Old Christian Law of the Frostathing*, § 4, "Vm legorðs sekt" [Concerning punishment for fornication] criminalises sexual relations between two unmarried partners.²⁷ It seems that Archbishop Eysteinn's contemporary, Bishop Þórlákr of Skálholt, in the

²⁵ James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago: University of Chicago Press, 1987), pp. 459, 518–519.

²⁶ Brundage, *Law, Sex, and Christian Society*, pp. 459, 518–519; Walter Prevenier, 'Violence against Women in Fifteenth-Century France and the Burgundian State', in *Medieval Crime and Social Control*, ed. by Barbara Hanawalt and David Wallace (Minneapolis, Minn.: University of Minnesota Press, 1999), p. 187; Ruth Mazo Karras, *Common women: Prostitution and sexuality in Medieval England* (New York: Oxford: Oxford University Press, 1996), p. 25, discusses fines for *leyrwite* payable to a feudal court.

²⁷ NgL, I, p. 149, *The Earliest Norwegian Laws*, p. 247. The first part of the paragraph runs: "If a woman lies with a man whom she is not allowed to possess, she owes a fine of three marks, just as he does with whom she lies." The preceding paragraphs concern different forms of illicit sexuality, like incest and adultery (*Vm horan*).

late twelfth century suggested three years' penance for fornication.²⁸ Also it very much looks as if the *Townlaw from Nidaros* criminalises the sexual relations of unmarried women. The relevant section prescribes that a woman had to pay fines to the king for the first three times she had lain with a man.²⁹ If the woman had had more than three affairs she did not have to pay the fine to the king "þrísvar er hon sek við konung", because in that case she was considered a whore, a *púta*. This also meant that her family was no longer entitled to compensation from the men. A woman's debauchery *ipso facto* precluded the possibility of gaining satisfaction. Knut Helle comments that sexual relations between unmarried people were not only proscribed by the Christian laws but also later by provincial statutes.³⁰ The *Young Christian Law of the Gulathing* prohibits sexual relations between two unmarried people. A period of five days is given to either enter into marriage, or to end the relationship and pay a fine for the crime.³¹ The formulation suggests that the regulation was aimed primarily at more long-term sexual relationships, but since all extramarital sexual relations were considered sinful relatively short-term relationships were probably also covered by this regulation. It very much looks as if these High Medieval sections define sexual relations of unmarried people both as sinful and criminal.

If we return to consider the legal practice in Norway before the Reformation we see that fornication was considered a criminal act. In lists of fines from the fiefs terminological synonyms of fornication (modern Norwegian *leiermål*) are used, e.g. *leyer*, *leygemaall* as well as variants of "slept with", *laa hooss* and "entice/seduce" *locke*.³² Diplomas

²⁸ Bull, *Folk og kirke i middelalderen*, p. 120 notes that Thórlákr prescribed "3 árs bod for utugt mellem ubeslegtede" [3 years penance for fornication/indecency between people who are not related]; Rafnsson, "The Penitential of St. Torlakur", p. 25.

²⁹ NgL, I, pp. 326–327, *Bjarkøyretten*, p. 90. The woman's family had a claim to compensation from the man. The paragraph specifies that it was the woman's father and possible brother who received the compensation. I interpret this formulation to mean that the woman in question was unmarried, because in case of a married or betrothed woman, the payment was due to her husband or fiancé, and not her father or brother. See for example *The Old Law of the Gulathing*, § 201, (NgL, I, p. 71), *The Earliest Norwegian Laws*, p. 145. The paragraph states that if someone lies with a woman who is betrothed to another, her fiancé has the same claim to compensation as the woman's heirs.

³⁰ Knut Helle, *Under kirke og kongemakt: 1130–1350*, Aschehougs Norges Historie, vol. 3 (Oslo: Aschehoug, 1995), p. 125.

³¹ NgL, II, p. 336: "Itam ollum þeim sem j frillo lifnadh liggia sæter ek æn iij fimter sinar frillor festæ æðer afsæria oc siin brot bæta".

³² NRJ, I p. 580, *legemall*; IV, pp. 307–308, *leyer* and *locket*; IV, p. 329, *leygemaall*. All cases date from the period 1520–1528.

from 1490 and 1529 contain terms like “virgin man” *mø man* and “violation of virgins” *jomffrv krencknyng*. The legal fixation here on women’s virginity before it was “violated” shows clear parallels to the *Koldingske Reces*, and therefore only perpetuating the older law.³³ The *Odenseske Reces* of 1539 is based on a Danish decree of 1537 where we read in section 9 that a *Jomfrukrænker* [violator of virgins] was obliged to give compensation to the woman’s guardian. Moreover he had to pay fines to the king as he previously (*tilforn* i.e. before the Reformation) had had to pay to the bishop.³⁴ This formulation shows that in Denmark before the Reformation, sexual relations with unmarried women was not merely dealt with under civil law, but also under criminal law, even if the Danish regional laws are silent on this point.³⁵ However, some Swedish regional laws did criminalise sexual relations between unmarried people *per se*, even if they were betrothed. This aspect is discussed by Per-Edwin Wallén and Mia Korpiola.³⁶

Returning to Norwegian law, we see that decrees from 1514 and 1521 make it clear that sexual relations involving the unmarried women of a household—in other words, fornication—could become matters of public concern. The legal authority quoted for this is the “Settergierdt och christen retten.”³⁷ The *Sættargerð* of 1277 (a compromise between the Crown and the Church regarding jurisdiction in cases under Christian law which was confirmed in 1458) we find that the term *frillu lifi* in the Norwegian version corresponds to *fornicacionis* in the Latin version.³⁸ In medieval Europe *fornicacionis* was used to denote sexual relations

³³ In 1490 a man was accused of being a woman’s *mø man*, DN, XXI, no. 635, p. 482; and in 1529 I have found the term *jomffrv krencknyng* DN, V, no. 1056, p. 771. Cf section 60 in the *Koldingske Reces*, *Forordninger, Recesser og andre kongelige Breve*, vol. I, p. 41.

³⁴ *Danske Kirkelove*, vol. 1, p. 12.

³⁵ Poul Johannes Jørgensen, *Dansk Strafferet fra Reformationen til Danske Lov*, ed. by Ditlev Tamm (København: Jurist- og Økonomforbundets Forlag, 2007), p. 361.

I am grateful to Helle Vogt for making this manuscript available to me prior to publication. See also Stig Iuul in *KL*, X, ‘Lejermål, Danmark’, p. 471.

³⁶ Regarding criminalisation of sexual relations between betrothed couples in Sweden, see Mia Korpiola, ‘Between Betrothal and Bedding: The Making of Marriage in Sweden, ca. 1200–1610’ (unpublished doctorate dissertation, University of Helsinki, 2004), pp. 157–158; Per-Edwin Wallén in *KL*, X, ‘Lejermål, Sweden’, pp. 472–474 points out that in certain circumstances (fornication in the churchyard, recurrence of relations after an oath to end it) some Swedish regional laws prescribe fines to the bishop for fornication.

³⁷ *NgL*, 2 rk, IV, pp. 66–65.

³⁸ The *Sættargerð* notes *frillu lifi*, *NgL*, II, p. 470 and *fornicacionis* *NgL*, II, p. 464. *NoMiddaldok*, pp. 136–151 presents a translation of the Latin version.

between two unmarried persons.³⁹ In addition, a decree from 1478, which mainly focuses on illegal sexual relations, contains a prohibition of *frille lefnit*.⁴⁰ Its first article reveals that the different heterosexual acts dealt with are categorized into incest, adultery, adulterers who ran away, and *frille lefnit*.

Friðlulfi denotes a sexual relationship involving unmarried persons, probably irrespective of whether it was long- or short-term.⁴¹ In the late twelfth century it seems that the Church increasingly condemned such affairs, which as we have seen is evidenced in legislation and penitentials. It appears that the terminology employed to describe the various forms of undesired heterosexual relations was not necessarily precise. In all likelihood, terms like *leyer*, *leygemaall* and *friðlulfi* were used indiscriminately both during the Middle Ages and the Early Modern Period. Terjesen's examination of illegal sexual relations in Rogaland supports this view.⁴²

Consequently, it seems obvious that sexual relations between two unmarried persons were criminalised before the Reformation. As the table in the introduction details, we know of 18 cases of fornication from the Middle Ages, and of 498 after 1537.⁴³

³⁹ Brundage, *Law, Sex, and Christian Society*, pp. 304–305.

⁴⁰ *NgL*, 2rk, II, p. 270.

⁴¹ Ebbe Hertzberg in *NgL*, V, p. 208 discusses the terms *friðla*, *frilla*, which originally meant a free-born concubine as opposed to an unfree concubine, *ambátt*. *Friðlulfi*, *friðlulifnaðr*, could denote long term cohabitation, but also short term affairs with 'loose' women. Regarding the more 'honourable' long term relationships in twelfth and thirteenth century Iceland, see Auður Magnúsdóttir, *Politik och samlevnad på Island 1120–1400* (Göteborg: Historiska Institutionen, 2001), chapter 2. *Politik, frillor, släkt och vänner*, which focuses on the interplay between politics, relatives and friends. It describes a system where the daughters of the elite were married to chieftains outside one's own *herred* (chieftaincy/lordship) in order to conclude alliances, while sons either married or had concubines within the *herred*. Magnúsdóttir proposes that this pattern of alliances was deliberate, promising political and economic advantages. The concubines' brothers were important supporters of the chieftains. Sverre Bagge, *Mennesket i middelalderens Norge: tanker, tro og holdninger 1000–1300* (Oslo, 1998), p. 54 points out that also more short term and looser sexual affairs could be important, as King Sigurd's short-lived affair with a maid shows: Håkon the Broadshouldered was born of this dalliance. When Håkon later became king (1159–62), the rich farmer with whom Håkon had grown up (and where his mother was working), and the former's sons supported Håkon.

⁴² Terjesen, *Blodskam og leiermål*, p. 66. Concerning cases of fornication (first time offenders) from the period 1602–1617 the term *leiermål* is frequently applied while before 1611 the term *frillelevnet* was also used.

⁴³ It is possible that the many unspecified fines for *abrot* in *Aslak Bolt's Jordebok* (I have found that men paid fines in 32 out of 34 such cases) are fines for fornication. When *abrot* is more closely defined in that rental, it always refers to sexual crimes. These

Prostitution and Moral Looseness

Especially in the bye-laws of Bergen, we find post-Reformation prohibitions against prostitution, which are not always clearly separated from rather imprecise stipulations against heterosexual indecency.⁴⁴ Bastiansen exemplifies this well by drawing attention to a decree from 1556, which stipulates that people guilty of adultery *hór*, of immoral/lewd living *skjørlevnet*, and people guilty of illicit love affairs *boleri*, were to be banned until they repented and changed their way of life.⁴⁵

Especially Bastiansen but also Næss give an overview of the legislation on prostitution and moral looseness for the period after the Reformation. However, due to their clear premise of a break between the medieval and post-Reformation legal situation they do not take into account that similar legislation had been passed in Norway already during the High Middle Ages.⁴⁶ The fact that prostitution and moral looseness was covered by corresponding regulations in medieval Norway has however been thoroughly documented by Knut Helle and Else Ebel in particular, and individual aspects are also discussed by Ingvild Øye, Sverre Bagge and Inger Holtan.⁴⁷

Helle has shown that the term harlot or prostitute, *portkono*, appears already in the *Old Law of the Gulathing* § 196 “Concerning insulting remarks that call for atonement”; its use may come from the twelfth century. It appears on a list of verbal insults which justified killing.⁴⁸ Also

unspecified cases of *abrot* are however not included in this study, since it is impossible to exclude that the word denotes other sexual crimes, and since there is also the possibility that *abrot* indicates other infringements of the Christian laws.

⁴⁴ Bastiansen, ‘Væ dig Bergen’, pp. 56–64. Karras, *Common women*, pp. 28–29, 34–35 notes that English legislation against whores was not directed against prostitutes as a clearly defined group.

⁴⁵ Bastiansen, ‘Væ dig Bergen’, p. 28. Here the term *boleri* is used, denoting any possible type of illegal heterosexual relations. *Skjørlevnet* would be synonymous with *boleri*; *skjør* being an obsolete word for *utuktig*, immoral.

⁴⁶ Næss, ‘Trolldomsprosessene’, pp. 49–50; Bastiansen, ‘Væ dig Bergen’, pp. 28–30, 56–64.

⁴⁷ Knut Helle, *Bergen bys historie. Kongssete og kjøpstad: Fra opphavet til 1536*, vol. 1 (Bergen: Universitetsforlaget, 1982), pp. 463–464, 763–766; Ingvild Øye, ‘Kvinner, kjønn og samfunn. Fra vikingtid til reformasjon’, in *Med kjønnsperspektiv på norsk historie*, pp. 49–50; Bagge, *Mennesket i middelalderens Norge*, pp. 124–125; Inger Holtan, *Ekteskap, frillelevnad og hor i norsk høgmellomalder* (Oslo: Universitetsforlaget AS, 1996), pp. 143–154.

⁴⁸ Helle, *Bergen bys historie*, p. 463. Other grave insults listed include a man being called a bitch, or being decried as having given birth to a child. The person making

the *Townlaw from Nidaros* stipulates that a woman, who had had more than three affairs, was considered a whore, a *púta*. In all likelihood, the word *púta* to denote a prostitute is of French origin, and found its way to Norway either directly or via Germany.⁴⁹ We shall also later discuss the *Hirðskrá* [*Book of the hirð* or *Law of the Royal Retainers*] and the *Konungs skuggsiá* [*the King's Mirror*] from the mid-thirteenth century, together with decrees from Håkon V's and Håkon VI's reigns, all of which Helle discusses in connection with prostitution.⁵⁰

From the Middle Ages, no cases of prostitution have been preserved. Bastiansen discusses the few glimpses we get of the legal practice, insights which only Bergen provides us with from the sixteenth century. According to the registers of fines in the account rolls of the fief in the late sixteenth century, 18 men paid fines because they visited women who in all likelihood were prostitutes. Regarding the question which criteria were used to determine if the cases would be subsumed under the category prostitution, Bastiansen looks at whether a woman was called a whore, where she lived, whether she had been accused of fornication or "loose living" several times, or whether she had a particular alias.⁵¹ Prostitution mainly occurs in urban areas, and during the period under discussion here, Bergen was by far Norway's biggest town.⁵² Prostitutes in such a town profited from greater anonymity and less control from family and neighbours. Bergen probably became a hotspot for prostitution because of its extraordinary demographic and economic situation. Within its population, there was great disparity between the number of men and women, and a rather high percentage

such insults would either have to pay full compensation to the offended party, or the latter could "seek satisfaction in blood", *The Earliest Norwegian Laws*, p. 143.

⁴⁹ Else Ebel, *Der Konkubinat nach altwestnordischen Quellen: Philologische Studien zur sogenannten "Friedelehe"* (Berlin, New York: de Gruyter, 1993), p. 139 notes that the term *púta* may derive from Old French *pute*. Cf also modern French *putain*, prostitute.

⁵⁰ Helle, *Bergen bys historie*, p. 463.

⁵¹ Bastiansen, 'Væ dig Bergen', pp. 57–59.

⁵² Bastiansen, 'Væ dig Bergen', pp. 16–18 for research on population numbers in Bergen. Population in 1550 is estimated to have been around 7000, the same level as before the Plague. Estimates for around 1600 vary from between 9000 to 16000. There would have been an additional 4000 men during the autumn fishing season. The European evidence for prostitution is linked to the High Middle Ages, a period which saw urbanisation and greater individual rights. Peter Schuster, *Das Frauenhaus: Städtische Bordelle in Deutschland (1350–1600)* (Paderborn: Schöningh, 1992) for a discussion of the German-speaking areas of Europe.

of well-off men who either married late or not at all.⁵³ Helle argues that prostitution probably became more prevalent in Bergen during the High Middle Ages, amongst other reasons, because of the presence of the Hanseatic League. Approximately a thousand young German men, forced to remain celibate, lived in the town, and as many again arrived during the sailing season.⁵⁴ Bergen's prostitutes also served the town's citizens and ecclesiastics. An entry in Absalon Pederssøn's diary from 1563, comments on an elderly prostitute who had monks, canons, priests, and courtiers among her clients.⁵⁵

Nowadays it is no secret where a town's "red-light-districts" are, and it may have been generally known in sixteenth-century Bergen that Øvregaten was the place to go. Øvregaten was the most prestigious street in Bergen during the High Middle Ages, gradually turning into an area of inns and brothels during the fifteenth century. This was probably no accident; several important churches and the German *Kontor* were close-by.⁵⁶ In the registers of fines in the account rolls we find Morten Clausen who came from Skien in order to buy a horse. More urgent needs, however, prevailed temporarily. The short entry informs us that as soon as he arrived in Bergen, Morten went to Øvregaten where he had sex with a prostitute, a crime for which he had to pay a fine.⁵⁷

The authorities desired to stamp out such conduct; amongst other things, they attempted to distinguish between prostitutes and loose women from more respectable women. In 1556 the lord of Bergenshus, Christoffer Walkendorf, issued a decree which included the following:

Item paa dett adt ingen Piige eller Andre Quindefolck skulle medt willie giffue siigh eller haffue Lyst till saadannt Løſagtſige leffnit, adt thage siig ein garp som hinde skulde klede oc føde, som tiidt oc offte skiedt er, da lodt hanndt forbiude oc befallede Presten adt ingenn skiøge eller Løſen konne skulle sidde vdj Stoell vdj kirckenn hous nogenn Danne Quinde. Diisligiste adt Inngenn aff dennom skulde ganngne medt danne Quinders

⁵³ In 1250 a peace agreement was concluded between King Håkon Håkonsson and Lübeck, and in Ebel, *Der Konkubinat*, pp. 133–134 we read that the oldest privilege for German merchants dates from the same year. They were forbidden to bring their own families with them, and to marry foreigners. Cf Øye, 'Kvinner, kjønn og samfunn', p. 50.

⁵⁴ Helle, *Bergen bys historie*, p. 762. Karras, *Common women*, p. 36 notes that many of the clients of prostitutes in English harbours were sailors.

⁵⁵ Helle, *Bergen bys historie*, p. 464.

⁵⁶ Bastiansen, 'Væ dig Bergen', pp. 59–61.

⁵⁷ Bastiansen, 'Væ dig Bergen', has transcribed the case in detail in her appendix no. 4.

dough som tilfornne tiidt oc offte er skiedt, Och icke helder motte de komme vdj nogenn Bryllup Adt siide vdj sede, ey heller ij Barßell, som tilforne wor skiedt, [...].⁵⁸

Item: Because no girl or other women should willingly give themselves or want to lead such a loose lifestyle, meaning to give herself to a German *Hansa* who would then provide her with clothing and food and which frequently happened, he then made the priest prohibit whores or loose women from sitting next to an honourable woman in church. Moreover, they were not allowed to walk around with the same headdress as honourable women, which previously had happened often, and neither should they sit in a chair at any weddings, nor christenings, which previously had happened [...].

Interestingly, the problem was not men as such, but more specifically a German *Hansa*, *ein garp*. Christoffer Walkendorf was probably well aware that the Germans posed a recurrent problem for Bergen. A letter of complaint from 1440, addressed to the Council of the Realm in Oslo from the town council and the parish of Bergen, accuses the members of the Hanseatic League of enjoying shameful relations with other men's wives. They were also said to lure widows and young women into a loose and depraved living (*løst og lastelig leffnitt*).⁵⁹ The problems noted in the letter of 1440 were not solved locally, which may be due to the Germans' powerful and partly violent opposition. Tellingly, the letter of complaint concludes by describing how the Germans stormed the town hall fully armed, so that no-one dared to oppose them.

We also read in Walkendorf's decree of 1556 that priests were charged with ensuring that in church loose women sat separated from so-called women of unblemished reputation.⁶⁰ Also the headdress was intended to show whether a woman was respectable or not. In 1573 more comprehensive dress codes were issued, forbidding all prostitutes and loose women to wear the same clothes as respectable women.⁶¹ Here,

⁵⁸ Bastiansen, 'Væ dig Bergen', p. 32. *Bergens Fundas*, ed. by Mikjel Sørle (Bergen: J. D. Beyer A. S. Boktrykkeri, 1957), pp. 70–71.

⁵⁹ *NgL*, 2rk, I, pp. 246–248.

⁶⁰ *Bergens Fundas*, pp. 70–71.

⁶¹ Bastiansen, 'Væ dig Bergen', p. 32. *Samling af Gamle Norske Love*, 2. Part, ed. by Hans Paus (København: Kongl. Univ. Bogtrykker Ove Lynov, 1752), p. 362, point 5. The prohibition in the decree of 8 January 1573 covered both gold and silver (gold-plated or otherwise), and a number of expensive fabrics. There is a long list of other dresses, hats and fabrics forbidden for loose women (loose women were for example only allowed to wear grey hats). Dress codes for prostitutes were introduced in Burgundy and Provence already in the twelfth century, see Ebel, *Der Konkubinat*, p. 139; also Karras, *Common women*, p. 21 for examples from England.

the post-Reformation legislators were probably inspired by an undated decree of Håkon V Magnusson (1299–1319) for Bergen.⁶² Sverre Bagge shows how Håkon V emphasises that marriage was the only legal form of cohabitation. Courtesans and loose women were not allowed to own the same elegant and expensive clothes as married women.⁶³ The difference between the dress codes from the High Middle Ages and from 1573 is that the latter is far more detailed regarding the various luxury cloths which were reserved for respectable women.

The decision of 1573 attempted to limit the activities of loose women in yet more areas. Drawing beer for example was a privilege for honest and respectable women (*uberygtede ærlige Danne Qvinder*) who in a similar decree by Håkon V are called righteous (*skilrika*) women.⁶⁴ Also the regulation forbidding house owners to rent out premises to prostitutes, thieves, or people who had committed perjury, dating 1573 and re-enacted in 1649, must have been copied from Håkon V Magnusson's decree. Landlords who broke the rule risked a fine of 8 ertog⁶⁵ and 13 marks, a typical fine for breaking the King's peace in the High Middle Ages, which the post-Reformation legislation retained.⁶⁶ Evidence of similar prohibitions can be found for Oslo. In Nils Stub's protocol of the lawthing from 1576 we find that a certain Bernt had rented out houses which were used for immoral and unchristian activities: "han haffde taghet leyge aff syne huse at brugis ther vtj løsactige oc mange wchristelighet gierningher".⁶⁷ The legal basis for which Bernt had to appear before the lawthing was a now lost decree which probably applied to the town of Oslo. When a prostitute pursued her business from the place she lived in, it was likely that her landlord had an inkling of what she was doing and demanded a higher rent. Fining the landlord as well

⁶² The basis for the post-Reformation decisions of the Town of Bergen can be seen in the relevant passages of this decree, *NgL*, III, pp. 210–211. According to Helle, *Bergen bys historie*, p. 463, the stipulation that prostitutes need to be distinguishable by their dress may be a sixteenth-century addition to an otherwise fourteenth-century decree. However, the existence of similar regulations in medieval Europe implies that it cannot be excluded that the above dress code was in fact already formulated in early fourteenth-century Bergen.

⁶³ Bagge, *Mennesket i middelalderens Norge*, pp. 124–125.

⁶⁴ Bastiansen, 'Væ dig Bergen', p. 33. *Samling af Gamle Norske Love*, 2. Part, p. 366, point 18. Cf *NgL*, III, p. 210. For the adjective *skilrikr* see *NgL*, V, p. 569.

⁶⁵ An ertog was a unit of value/money of ca. 9 gram.

⁶⁶ Bastiansen, 'Væ dig Bergen', p. 33. Decree of 1573, see *Samling af Gamle Norske Love*, 2. Part, p. 368, point 26, cf *NgL*, III, p. 210.

⁶⁷ *Nils Stubs*, p. 119.

was, therefore, well-founded. Procuration, usually called *rufferi* after the Reformation, was undesirable. Bastiansen documents this with a decree from 1616.⁶⁸

Procuration was prohibited throughout the country, as the *Norwegian Law* of 1604 shows:

Er der nogen rufferske, som vil ruffe folck sammen, oc locke nogit barn til ont leffnit, eller oc nogen mands frendkone, oc er der til vidne: da bøde effter 12. mends dom, som hun haffuer formue til.⁶⁹

A procuress, who will lead people into prostitution, and entice any child or any man's female relative into an evil living, and there are witnesses, then she shall be fined according to judgement of 12 men and dependent on the size of her property.

I thus understand this section to cover both prostitution (*ruffe folck sammen*) and general indecency. However, we need to underline yet again that this regulation has a long history. Here, as Frederik Brandt and Frederik Hallager show, the obvious model was the *Landslaw*, more precisely a section which Absalon Taranger has argued was a novelty in Norwegian law.⁷⁰ Handeland underlines that the wording in the *Landslaw* shows certain similarities with a provincial statute issued by Archbishop Eirik Ivarsson and his suffragan bishops in Bergen, Oslo, Stavanger and Hamar in 1189 (or possibly earlier in 1190). Amongst other the archbishop prohibited women, *konvm*, from enticing others to indecency through parties, meetings or other happenings.⁷¹

⁶⁸ Bastiansen, 'Væ dig Bergen', p. 33. *Norske magasin: skrifter og optegnelser angaaende Norge og forfattede efter reformationen*, andet bind, ed. by N. Nicolaysen (Christiania: Johan Dahls forlagshandel, 1868), p. 287: "Finnes nogen kroersker eller andre som opholde nogen horer og ublue kvinner, som bruge løst levnet, da straffes derfor som andet rufferi" [Any innkeepers or others who house whores or indecent women who live a loose life shall be punished as for other procuring].

⁶⁹ *Kong Christian den Fjerdes norske Lovbog af 1604*, IV 2, p. 70.

⁷⁰ *Kong Christian den Fjerdes norske Lovbog af 1604*, p. 70. Cf. L V 2–3, *NgL*, II, p. 75: "En konor þær er liaxt til þess at locka til slíks eða annars saurlífis born manna eða frendkonor oc uerðr þat uitnisfast. Þa bote eptir .xij. manna dome penningum su er peninga hefir til. en hin hafe refsing eptir dome". [But women, who are engaged in luring people's children or female relatives into such activities (this refers to the above prohibition of marrying without the approval of parents or guardians) or other loose living, and it can be proven by witnesses, shall be fined according to the judgement of twelve men. That is if the women have money, if they do not, they shall be punished physically according to judgement.] Absalon Taranger, *Magnus Lagabøters landslov*, p. 74, interprets *refsing* as punishment on the body; "revses paa kroppen".

⁷¹ Handeland, 'I lyst og last', p. 107. *DI I*, no. 41, pp. 233–235. However, this prohibition is not contained in a letter issued by Archbishop Eystein in 1176 (as Handeland

Consequently, the women, *konor*, of the medieval laws correspond to the bawds, *rufferske*, from the seventeenth century. Throughout this long period, first and foremost this procuress is seen as the fiend, the one who literally lures others into sin. Indeed, in medieval Europe it was mainly women who were associated with procuring.⁷² In medieval and post-Reformation Bergen, members of the Hanseatic League were also prominent amongst those accused of luring respectable women into immorality.

The archbishop's complaint from 1189/90 shows that special banquets were arranged where men and women could initiate "immoral" contacts. Similar information can be found in the above mentioned decisions of the town council of Bergen in 1616. They indicate that *kroersker* combined the services of an inn with those of a brothel when they—in breach of town policy—housed "horer og ublue kvinner" [whores and shameless women]. Also the mid-thirteenth century *King's Mirror* and the *Law of the Royal Retainers* contain similar cautions. In the *King's Mirror*, in a dialogue between father and son, the latter is told in no uncertain terms that contact with prostitutes, *portkonor*, and frequentation of brothels, *portkvænna hus* may lead to serious harm: "Still there are some things that you shall beware of like the devil, and that is drinking, gambling, prostitutes, quarrels and games of dice and winnings, because on these foundations the largest accidents are built, [...]"⁷³ Here and in the *Law of the Royal Retainers* visits to brothels and contact with whores is likened to other undesirable activities, such as drinking and gambling.⁷⁴ Norway was no exception in this respect; in German brothels for example, food and drink were served and gambling was common. According to Peter Schuster a number of German towns attempted to rein in such activities in the thirteenth and fourteenth

based on *DI* I, no. 41 writes), but in a provincial statute issued by Archbishop Eirik. See *RegNorv* I, no. 197, pp. 85–86, who also points to the publication in *NgL*, IV, pp. 98–100.

⁷² Karras, *Common women*, p. 62.

⁷³ The Old Norse text can be found in *Konungs skuggsiá* ed. by Ludvig Holm-Olsen (Oslo: Kjeldeskriftfondet, 1983), p. 5. According to Ebel, *Der Konkubinat*, p. 162, the term *portkona* points to a society engaged in maritime travel and long-distance trade.

⁷⁴ Also the *Law of the Royal retainers* links *portkonur* to various vices a member of the royal household forces has to beware of. *Hirdloven til Norges konge og hans håndgangne menn: Etter AM 322 fol.*, ed. and trans. by Steinar Imsen (Oslo: Riksarkivet, 2000), pp. 110–111.

centuries.⁷⁵ Barbara A. Hanawalt notes that legal cases from medieval London show that inns attracted disturbances, from noise and general trouble to gambling, prostitution, rape, murder and riots.⁷⁶

Both whores and women who were not sufficiently coy are mentioned in the same breath in the above mentioned decree of 1616, indicating that from a legal point of view the definition of prostitution was not limited to business transactions where the woman received payment in return for sex. Rather, there emerges a more diffuse picture of a whore as any woman with somewhat looser sexual morals. Yet again this parallels the Middle Ages. A decree issued by Hákon V Magnusson in 1313 uses the word *pútur* [harlots] for women who received small or large payments, or who had sexual relations with two men in one day.⁷⁷ This understanding was probably influenced by canon law, where prostitution was defined by “promiscuity and gain”. Even when money in exchange for sex was not the main motivation, women who were considered whores were frequently assumed to have such financial interests.⁷⁸

Being considered a whore also reduced a woman’s legal worth. A woman’s individual liability to prosecution ended the moment she was defined a whore, which according to the *Townlaw from Nidaros* was when she had had more than three affairs. In which case, she did not have to pay the fine to the king (*þrísvar er hon sek við konung*) because she was considered a whore, a *púta*. Indications that prostitutes were not considered legal persons are supported by the evidence from the abovementioned decree from 1313. In this we read that common whores (*almenniligar pútur*) cannot testify in court, especially concerning important cases.⁷⁹ This is in accordance with Ruth Mazo Karras findings from the ecclesiastical courts in medieval London, York and Canterbury, that also accorded little value to statements made by prostitutes and other disreputable women.⁸⁰ Otherwise, as legal practice amply documents,

⁷⁵ Schuster, *Das Frauenhaus*, p. 68.

⁷⁶ Barbara A. Hanawalt, ‘The Host, the Law, and Medieval London Taverns’, in *Medieval Crime*, p. 212.

⁷⁷ *NgL*, III, p. 100.

⁷⁸ James A. Brundage, ‘Prostitution in the Medieval Canon Law’, in *Sexual Practices and the Medieval Church*, ed. by Vern L. Bullough and James A. Brundage (Buffalo, New York: Prometheus Books, 1982), p. 150.

⁷⁹ *NgL*, III, p. 100, a reference also discussed by Else Mundal, ‘Kvinner som vitne i norske og islandske lover’, in *Sagnþing helgað Jónasi Kristjánssyni sjötugum 10. apríl 1994*, ed. by Gísli Sigurðsson, Guðrún Kvaran and Sigurgeir Steingrímsson (Reykjavík: Hið íslenska bókmenntafélag, 1994), pp. 599–600.

⁸⁰ Karras, *Common women*, p. 98.

the testimonial of a medieval Norwegian woman had the same force as that of a man's.⁸¹ Also the prostitutes of seventeenth-century Bergen seem to have had reduced legal worth; the evidence from the registers of fines from the account rolls suggests that usually only the male clients were punished.⁸² Bastiansen underlines that the town council of Bergen decided in 1569 that "loose" women were to be fined if they did not leave the town or alternatively move up to Øvregaten in accordance with the town judge's orders.⁸³ It seems that normally prostitutes did not risk fines for selling sex as such, but for performing these activities in the "wrong" place. Apparently, attempts to curtail prostitution concentrated on moving the milieu to less visible areas.

For the most part, post-Reformation legislation on prostitution resembles that of the Middle Ages to such a great extent in regards to the contents and, partly the terminology, that it may be characterised as a copy, albeit in more modern language. Consequently, the prevalent view that prostitution was tacitly accepted by secular and ecclesiastical authorities in medieval Norway can no longer be maintained. In this respect, Norway was part of medieval Europe, and Helle finds parallels between the regulations on prostitution from the Continent in the

⁸¹ Several letters from the Late Middle Ages show that so-called "good women" assembled at the *thing* assemblies together with "good men", and that they also gave testimony in legal cases, whether they concerned civil law matters such as conflicts about borders between farms or criminal law matters such as murder or sexual crimes. Riisøy, *Stat og kirke*, pp. 163–164; Mundal, 'Kvinner som vitne', pp. 593–602; Tine Berg Floater, 'Med nøkler i beltet og loven i ryggen: kvinners stilling i rettssystemet i Norge i hundreåret etter Landslovens innføring' (unpublished dissertation (hovedoppgave), University of Oslo, 1997), pp. 148, 151; Grethe Authén Blom, 'Loven og livet. Holdninger til kvinner i senmiddelalder og tidlig nyere tid, belyst gjennom rettsdokumenter', *Tidsskrift for Retsvidenskap* 5 (1991), pp. 543–569.

⁸² The informative appendix in Bastiansen, 'Væ dig Bergen' on cases of prostitution in Bergen shows that six women paid fines in the seventeenth century. Some of these probably paid fines for procuration. Mette ran an indecent establishment and incurred fines for fornication; Susanne was fined for *rufferij*. Karen, with the epithet *Pompekiste*, lit. Farthing chest, described as a whore, seems to have been fined for prostitution, although only a third of the fine incurred by the man. In addition, three women are noted for having lain with men three times. These were probably merely women leading a loose life, punished according to the ordinance against loose living of 1617. Regarding buying and selling sex, thus it seems that primarily procurers and customers were criminalised and paid fines, not the prostitute herself.

⁸³ Yet Bastiansen, 'Væ dig Bergen', p. 60 remarks that the lists of cases indicate continuing prostitution in Øvregaten.

thirteenth century, and from Bergen, issued little afterwards.⁸⁴ This very obvious continuity in the legislation against prostitution renders it superfluous to discuss whether or not the fear of syphilis influenced the relevant laws after the Reformation.⁸⁵ This also applies to another explanation given, the fear of God's punishment; this must have been just as powerful during the Middle Ages. Yet prostitution was not considered one of the most serious sexual crimes, neither during the Middle Ages nor after the Reformation. Prostitution was frequently mentioned in connection with other objectionable activities such as drinking and gambling. It is therefore likely that legislation against prostitution was also motivated by a general desire to keep the peace in town. In other words, it was necessary to control activities that might disrupt public order and attract criminal elements.

Incest

The oldest Christian laws list from eleven to seventeen women with whom marriage or sexual contact is considered incestuous, and a similar rule is enacted in the younger Christian laws.⁸⁶ As Jan Ragnar Hagland points out, these relationships correspond to the fifteen to seventeen cases of incest listed in the Old Testament (*Leviticus* 18.6–18).⁸⁷ Also so-called *guðsifjaspell* (godparenthood also called spiritual kinship) was considered incestuous.⁸⁸ The younger Christian laws stipulate that no one shall have his female relative, which includes biological kinship

⁸⁴ Helle, *Bergen bys historie*, pp. 436–464.

⁸⁵ Allen Karker in *KL*, XIII, 'Prostitution', p. 507, focuses on the fear of syphilis; Næss, 'Trolldomsprosessen', p. 49 on averting God's wrath; while Terjesen, *Blodskam og leiermål*, p. 38 argues that both the fear of God's punishment and of syphilis put an end to tolerating prostitutes.

⁸⁶ G § 24, *NgL*, I, pp. 15–16. This paragraph starts with discussing the seven prohibited degrees of marriage, when a man can marry a woman (*kono*), before listing the specific women which entails outlawry if a man "sleeps with" her (*legst með*). Cf F III § 3, (*NgL*, I, pp. 149); E 52 (*NgL*, I, p. 392) if a man sleeps with or marries (*ef hann liggir meðr bæim. eða fær fange*), B version I § 15, if a man sleeps with or marries (*liggr legre eða fær fange*) cf B version II § 11, B version III § 8, (*NgL*, I, pp. 350, 356, 366). NB II § 26, (*NgL*, IV, p. 175).

⁸⁷ Hagland, Jan Ragnar, 'Norwegians and Europe: The Theme of Marriage and Consanguinity in Early Norwegian Law' in *Scandinavia and Europe 800–1350, Contact, Conflict, and Coexistence* ed. by Jonathan Adams and Katherine Holman (Turnhout: Brepols, 2004), p. 218.

⁸⁸ See *NgL*, V, p. 252 for references to *guðsifjaspell*, *guðsifjar* and *guðsifja*.

(*frendkono*) and affinity (*sifkono*), in marriage or for bodily pleasure (*likams losta*) closer than the fifth degree. If someone commits incest in the fourth degree, or closer, then they shall part, pay fines to the bishop according to the seriousness of the incestuous degree and go to confession.⁸⁹

After the Reformation the regulations concerning spiritual kinship, which is the type of kinship established by baptism, were abrogated.⁹⁰ The concept of kinship based on either biology or affinity, survived. It is possible to infer information of the changing concept on incest through the changes in the prohibition of endogamous marriage. The church decrees of 1537 and 1539 limited the definition of incest to sexual relations with relatives of the third degree or closer (*intet Ecteskab tilstedis vdi det tridie led*), as opposed to the fourth degree before the Reformation.⁹¹ Thus, after the Reformation the definition of incest in the decree follows the example of the Christian laws (and canon law), by providing the forbidden degrees of kinship and not the Bible's illogical enumeration of individuals.⁹² For instance also the *Norwegian Law* of 1687 defines sexual affairs between people who are related in the second or third degree as incestuous.⁹³

The new third degree of kinship limit regarding the prohibition of marriage was taken up by Fredrik II's decree on marriage of 1589. Admittedly, the decree on marriage of 1589 made an exception for

⁸⁹ NB § 21, (*NgL*, II, p. 302); NG § 30, (*NgL*, II, p. 322); NB II § 25, (*NgL*, IV, p. 175). See also appendix 1.

⁹⁰ Knut Robberstad, *Frå gamal og ny rett* (Oslo: Det Norske Samlaget, 1950), p. 37.

⁹¹ Church decree of 1539, *Danske Kirkelove*, vol. 1, p. 74. Nils Hemmingsen (the foremost Danish theologian of the sixteenth century) declared man and wife to be similar to a body. Therefore the man's relatives were close to the wife, and vice versa. This meant that members of the man's family should refrain from marrying member of the woman's family in the same way as she was to avoid such unions. The same applied to members of the woman's family. In-laws were put on a par with biological relatives and consequently included in the prohibition of incest. *Vejledning i ægteskabs-sager* 1572, Niels Hemmingsen, ed. and trans. by Richard Mott (København: Forlaget Øresund, 1987), pp. 81–82.

⁹² The definitions of incest in the Old Testament do not mention cousins or second cousins, who are relatives of the second and third degree. As Sandvik, 'Tidlig moderne', p. 117 expresses it, the faculty of theology "improved" Old Testamentarian calculations on the number of prohibited degrees.

⁹³ *Kong Christian den Femtes Norske Lov: 15de april 1687*, 6–13–13, p. 255: "Om nogen, som ere hinanden i andet Leed, eller andet og tredie Leed, eller i tredie lige Leed beslægtede, eller i samme Leede besvoglede, findis at ligge i et ont Levnet tilsammen og avle Børn".

nobles, where merely marriage between cousins was prohibited.⁹⁴ The dispensation for nobles to be able to marry their relatives of the third degree can to a certain extent be seen as a privilege of the aristocracy. It was possible to make this exception since it did not clash with Biblical law and it was probably motivated by the desire to avoid applications for dispensations.⁹⁵ We know that during the medieval period it was at times difficult for the elite to formalise marriages with persons of the same social class, unless a papal dispensation was forthcoming for unions which would otherwise have been considered incestuous.⁹⁶

We know of 19 cases of incest from the Middle Ages, and of 43 from the post-Reformation sixteenth century. There is agreement among medievalists and historians of the Early Modern Period that incest was a crime in the Middle Ages. However, as I discuss in the following part B dealing with *Punishment*, it may be necessary to adjust common views on punishment in cases of serious forms of incest.

Rape

Rape was a crime both during the Middle Ages and after the Reformation. Prohibitions are found in several of the medieval Christian laws, in the secular parts of the regional laws (meaning, laws issued before the *Landslaw*) and in the *Landslaw*. Such cases include elements of violence and sexuality, which probably reflects the fact that in the Middle Ages, rape was dealt with by both Christian laws and secular laws. The regulations are based on common principles which also re-appear in later legislation. A rape charge was to be made as quickly as possible. Statements from witnesses and physical markings were important elements of evidence.⁹⁷ The relevant paragraph in the *Landslaw* is taken up

⁹⁴ *Lover og forordninger 1537–1605*, p. 219.

⁹⁵ Robberstad, *Frå gamal og ny rett*, p. 38 writes that Christian IV allowed marriage between second cousins in return for a substantial fee.

⁹⁶ A few of those are extant from medieval Norway, see Robberstad, *Frå gamal og ny rett*, p. 37.

⁹⁷ For instance, § 199 in the *Old Law of the Gulathing* (NgL, I, p. 71), stipulates that if the man is found guilty he is an outlaw unless he pays a 40 marks fine and compensation to the woman. The woman must present her accusation the same day, and it is possible for the man to clear himself with a twofold oath. Discussion of rape in the provincial laws in Handeland, 'I lyst og last', pp. 94–103. Rape is also mentioned in some manuscripts of the *Young Christian Law of the Gulathing* (§ 33, in a general

by the *Norwegian Law* of 1604.⁹⁸ Also the decree on marriage of 1589 and the *Norwegian Law* of 1687 prohibit rape.⁹⁹ We have evidence of 3 and 10 cases of rape respectively from the Middle Ages and the post-Reformation sixteenth century.¹⁰⁰

Bestiality and Homosexuality

In Norwegian law, bestiality was criminalised already in the *Olafstext* of the *Old Christian Law of the Gulathing*, and it was also criminalised in the *Old Christian Law of the Frostathing*.¹⁰¹ The prohibition against homosexuality was introduced in the *Old Christian Law of the Gulathing* in 1163/1164 (the so-called *Magnustext*).¹⁰² This section has been thoroughly discussed by Kari Ellen Gade.¹⁰³ I am however not entirely convinced about her statement that this paragraph was introduced in order “to gain control of the property of the accused and as a convenient tool to rid Church and state of their enemies”.¹⁰⁴ The late twelfth century was a rather unruly period in Norwegian history, but there is no corroborating evidence that homosexual accusations were used to further political claims. I would therefore propose an alternative explanation for the introduction of this paragraph. When Archbishop Eystein introduced a series of new rules regarding questions of moral, marriage and

regulation on outlawry, *NgL*, II, p. 323–324), which asks whether the woman is “blue and bloody” (*bla æda blodga*).

⁹⁸ L IV 3 (4), (*NgL*, II, p. 213), *Magnus Lagaboters landslov*, pp. 46–47; *Kong Christian den Fjerdes norske Lovbog af 1604*, III 2, p. 43.

⁹⁹ The decree on marriage of 1589 stipulates that a man who rapes an honest girl or widow shall be punished according to law. If he escapes the death penalty, he may marry her if she and her guardians consent. Otherwise, he shall pay her compensation. A man, who commits several rapes, shall be punished on his life or with other serious punishment. *Lover og forordninger 1537–1605*, p. 220. A similar rule is enacted in *Kong Christian den Femtes Norske Lov: 15de april 1687*, 6–13–16, pp. 255–256; see also the two following paragraphs.

¹⁰⁰ Towards the end of the Middle Ages variants of the word for rape, (modern Norwegian *voldtekt*), are known: *wolteckt*, *wolteyt* and *wal tach* appear; see *DN*, II, no. 1001, pp. 734–735 [1498]; *DN*, XIII, no. 163, pp. 140–141 [1499]; *DN*, V, no. 992, pp. 714–715 [1502].

¹⁰¹ G § 30, (*NgL*, I, p. 18); F III § 18, (*NgL*, I, p. 153), *The Earliest Norwegian Laws*, pp. 57, 252. By contrast, I have not found any regulations on bestiality in either the *Old Christian Law of the Borgarthing* or the *Old Christian Law of the Eidsivathing*.

¹⁰² G § 32, (*NgL*, I, p. 20), *The Earliest Norwegian Laws*, p. 60.

¹⁰³ Kari Ellen Gade, ‘Homosexuality and rape of males in Old Norse law and literature’, in *Scandinavian Studies* 58 (1986) pp. 123–141.

¹⁰⁴ Gade, ‘Homosexuality’, p. 131.

sexuality, he probably attempted to include all kinds of sexual activities which were contrary to Christian ethics. Regarding homosexuality, the penitentials might have been a source of inspiration, and Pierre J. Payer finds that the penitentials of Early Medieval Europe show some interest in homosexual activities.¹⁰⁵ Besides, it is obvious that homosexual acts were not unknown phenomena in early medieval Norway; secular legislation regarding defamation existed and the sagas contain depictions of episodes having homosexual elements. These portrayals are predominantly negative.¹⁰⁶ The passive partner in particular is described as contemptible and unmanly, while the active and aggressive partner is not as stigmatised. Preben Meulengracht Sørensen observes that Christian thinking does not distinguish between the passive and active roles in homosexual relations. Together with bestiality, homosexuality is however strongly condemned by the Church. In the *Icelandic Homily Book* the sermon on the Annunciation mentions among grave sins: "...those appalling secret sins perpetrated by men who respect men no more than women, or violate quadrupeds."¹⁰⁷ If we consider the penitentials, it is clear that Bishop Thórlákr of Skálholt adhered to the same view when he prescribed the most severe penances for: "adultery between males, or that committed by men on quadrupeds"¹⁰⁸ Furthermore, the bishop explained that men could "sully themselves" in various ways, graded thus: petting with women, by using their own hands, drilled wood (!), and mostly through another man's hands.¹⁰⁹ Bishop Thórlákr had not forgotten women: "if women satisfy each other they shall be ordered the same penance as men who perform the most hideous adultery between them or with a quadruped."¹¹⁰ Also the penitential of Archbishop Henrik Kalteisen, nearly 300 years later, prescribes the most severe penance for bestiality and homosexuality.¹¹¹

¹⁰⁵ Pierre J. Payer, *Sex and the Penitentials: The Development of a Sexual Code, 550–1150* (Toronto: University of Toronto Press, 1984).

¹⁰⁶ Sørensen, Preben Meulengracht, *The Unmanly Man: Concepts of Sexual Defamation in Early Northern Society*, trans. by Joan Turville-Petre, The Viking Collection, 1 (Odense: Odense University Press, 1983).

¹⁰⁷ Sørensen, *The Unmanly Man*, p. 26.

¹⁰⁸ Translation in Sørensen, *The Unmanly Man*, p. 26.

¹⁰⁹ Rafnsson, 'The Penitential of St. Torlakur', p. 25.

¹¹⁰ Sørensen, *The Unmanly Man*, p. 26.

¹¹¹ *Erkebiskop Henrik Kalteisens Kopibog* p. XVIII; Bull, *Folk og kirke i middelalderen*, pp. 151–153. Here 15 years Church discipline are prescribed for incest with relatives of the first degree, homosexuality and bestiality, then 12 years for incest with relatives of the second degree, and 9 years for the third degree and double adultery, the latter carrying the same punishment as premeditated murder.

The younger Christian laws combine the prohibition of bestiality and homosexuality in one and the same regulation. These laws subsume such relations under one heading, a man's sexual relations with a living being other than a woman: "En sa madr er dryghir likams losta vid nockot annat kvikindi en kono".¹¹² *Archbishop Jon's Christian Law* prohibits bestiality; a stipulation derived from the *Old Christian Law of the Frostathing*.¹¹³ The decree of 1478, introduces the formulation "wicked deed, which is against nature" (*slem gerninng, som er i modt naturen*) which denotes both bestiality and homosexuality.¹¹⁴ Apparently, this was a direct translation of a formulation derived from classical antiquity, common in medieval Europe and not unknown to Scandinavia.¹¹⁵ In post-Reformation legislation, bestiality and homosexuality are mentioned in one of the shortest sections of the *Norwegian Law* of 1687. Chapter 13, dealing with *Løsaktighed* [Loose living], contains the rule "intercourse, against nature, is to be punished with death at the stake" (*omgjængelse, som er imod naturen, straffes med bål og brand*).¹¹⁶ The definition of homosexuality and bestiality as acts against nature therefore has long continuity in Norwegian law.

We know of one case of bestiality and one case of homosexuality from the years immediately before the Reformation. In the year 1564 one case of bestiality is described in Absalon Pederssøn's diary.¹¹⁷ Crimes of

¹¹² NB § 24, (NgL, II, p. 304); NG § 33, (NgL, II, p. 324); NB II § 29, (NgL, IV, p. 176). Cf NgL, V, p. 370 *kvikindi* in the meaning of a living being, but it could also refer to *kvikfē*, cattle. For a short overview see KL, III, 'Ergi', pp. 9–10. Gade, 'Homosexuality', p. 129 has found a marginal remark in the *Young Christian Law of the Borgarthing* II, NgL, IV, p. 176, which shows that at least the compiler of this manuscript considered this section to refer to bestiality alone.

¹¹³ J § 58, NgL, II, p. 382 note 1 "blandazst við annan fenað" or "við bufē". Cf NgL, V, p. 122 where *bufē* is translated as cattle, and the expression "blandast við b." as to "have kjønsomgang med kvæg", to have sexual relations with cattle.

¹¹⁴ NgL, 2rk, II, p. 270. See Appendix 1.

¹¹⁵ See Brundage, *Law, Sex, and Christian Society*, pp. 533–536 who discusses the expression "sins against nature". Øystein Rian, 'Mellom straff og fortielse. Homoseksualitet i Norge fra vikingtiden til 1930-årene', in *Norsk Homoforskning*, ed. by Marianne C. Brantsæter et al., (Oslo: Universitetsforlaget, 2001), p. 32 draws attention to a accusation St Birgitta made in 1361: she reproached the Norwegian/Swedish King Magnus Eriksson that he had the worst reputation within the kingdom and abroad because he reputedly commits gross indecency with men, against nature.

¹¹⁶ Aarset, *Rettslig regulering*, p. 13 note 25. *Kong Christian den Femtes Norske Lov: 15de april 1687*, 6–13–15, p. 255. See Rian, 'Mellom straff og fortielse', p. 34.

¹¹⁷ *Absalon Pederssøns dagbog*, p. 186. In 1530 a man was accused of having engaged in sexual acts with a cow, and the man was burnt. DN, XXII, no. 159, pp. 152–153 Per Slatthem and Gunner Ramstadt were fined for *kiætterij* in 1528, NRJ, IV, p. 338.

sodomy continued to be numerically insignificant in Norway during the seventeenth century. While studies of sexual crimes in the seventeenth century note individual cases of bestiality I have not found any mention of homosexuality. According to Halvorsen Aarset the prohibition of homosexual acts between men began to have serious consequences in practice only towards the end of the nineteenth century. This development was connected to changes in the size of population and in culture, since homosexuality was first and foremost a phenomenon of urban milieus.¹¹⁸ During the Middle Ages there are indications that homosexual relationships typically occurred in a rather secluded male environment, rendering detection difficult. It probably speaks volumes that the first written mention of the Christ Church in Oslo refers to graffiti, a text in runic script describing homosexual acts supposedly engaged in shortly before the year 1200.¹¹⁹ About a century later, Bishop Laurentius of Hólar was accused of having been the passive part in a homosexual act which took place in Nidaros. Someone had incised an inner wall of Nidaros Cathedral with the Latin inscription “Laurentius Celvi (= Kalvsson) anus Petri”. Grethe Authén Blom explains that the carver (probably one of the canons) manages a pun on the Church’s honorific title *filius Petri* and at the same time alludes to Laurentius having a relationship with one of the kingdom’s most noble men, the knight Peter Gudleiksson of Eid in the Nordfjord.¹²⁰ According to Payer a number of sections in the penitentials of Early Medieval Europe refer to homosexual acts amongst ecclesiastics. As Payer points out, this

¹¹⁸ Aarset, *Rettslig regulering*, pp. 45–47 refers to a judgement by the high court from 1847 which states that at the time there had been no precedent. By then, population numbers in Christiania had reached around 100,000. Aarset underlines that it was also only around that time that in Denmark sexual relations between men were prosecuted to a certain extent.

¹¹⁹ Terje Spurkland, *I begynnelsen var fupark: Norske runer og runeinnskrifter* (Oslo: Cappelen akademisk forlag, 2001), pp. 208–209. The inscription, engraved on a bone which archaeologists dated to the late twelfth/early thirteenth century, has been translated by Spurkland. Regarding homosexuality as a phenomenon of urban areas see Guido Ruggiero, *The Boundaries of Eros: Sex Crime and Sexuality in Renaissance Venice, Studies in the History of Sexuality* (New York: Oxford University Press, 1985), pp. 109–146, who discusses this for Renaissance Venice. Brundage, *Law, Sex, and Christian Society*, p. 472 mentions that most medieval people believed homosexuality to be prominent among ecclesiastics and in towns.

¹²⁰ Grethe Authén Blom, *St. Olavs by: ca. 1000–1537*, Trondheim bys historie, vol. I, (Trondheim: F. Bruns bokhandels forlag, 1956), pp. 200–201. I am grateful to Margrete Stang for bringing this reference to my attention.

does not have to imply that such activities were out of all bounds, but it does reflect the fact that homosexual acts occur in institutions whose members are exclusively of one gender.¹²¹

This overview shows that homosexuality and bestiality were criminalised in Norwegian law at the latest by the end of the twelfth century. From the mid-thirteenth century on, the younger Christian laws reformulated the existing prohibitions, subsuming them under one term. Finally, in 1478, such acts were defined as contrary to nature.

The Term Heresy (Kjetteri)

To conclude this overview, it is necessary to elucidate the use of the term *kjetteri* [heresy]. This expression occasionally appears in legal documents and judgements in connection with the most reprehensible sexual crimes.

Historically, the word *kjetter* derives from the Cathars (Latin *cathari*), one of many groups practising what the Catholic Church called heresy (from Greek *hairesis*, choice): a religious opinion contrary to that of the Roman Church. Therefore logically, *kjetteri* should be a subset of *heresy*, but in Norwegian *kjetteri* seems to have become the direct translation for heresy. Very few diplomas have been preserved in Latin, but it is probably symptomatic that the various deeds of Ragnhild Tregagås in the 1320s, which are comprised of elements of witchcraft, incest and adultery, are described in the Latin report on the case as *hæresi*.¹²² Among cases reserved for ecclesiastical jurisdiction in the *Sættargerð* in 1277, the *heresies* in the Latin version is rendered “uillu ok uantru”,

¹²¹ Payer, *Sex and the Penitentials*, pp. 43–44.

¹²² DN, IX, nos. 93, 94, pp. 112–114. After taking counsel from his canons and with the agreement of other ecclesiastics who were present, Bishop Audfinn sentenced Ragnhild to fasting on water and bread twice a week and on specified other days, and to depart on a seven year’s pilgrimage abroad. In case she disregarded the sentence she would be guilty of a relapse into heresy. It seems that heresy was also associated with sorcery in Norway after the Reformation. In one witchcraft trial from 1667 we hear of a peasant saying “may God grant that the troll heretics be burned up” (*Gud giffue at troldkietterne motte blifue opbrende*). Here then we find a combination of troll and heretic. Statsarkivet i Kristiansand, Tingbok for Lista, fol. 29b. See Gunnar W. Knutsen and Anne Irene Riisøy, ‘Trolls and Witches’, *Arv, Nordic Yearbook of Folklore*, 63, (2007), p. 55. In medieval Europe, heresy was also strongly associated with sorcery by both secular and ecclesiastical authorities, and it was thought that heresy might corrupt the kingdom.

that is [religious/moral perversion and wrong faith] in the Norwegian.¹²³ During the later Middle Ages and Early Modern Period it seems that sexual perversion in particular, became connected to ideas about this religious/moral perversion.

The term *kjetter* probably came to Norway from Germany or Holland. In Church history a *kjetter* was a person who deliberately followed or attempted to spread teachings which differed from those of the established Church, especially concerning important issues. The term *kjetteri* did not only denote controversial theological views, but to a large degree also serious sexual crimes. Brundage explains that in medieval Europe homosexuality was frequently associated with *heresi*.¹²⁴ This association was not unknown in the North either; in the single case of homosexuality documented from medieval Norway we read that Per Slatthem and Gunner Ramstadt were fined for *kiætterij* in 1528.¹²⁵

Reprehensible sexuality was somehow connected to religious deviation, and this view is also reflected in a stipulation in the *Old Law of the Frostathing*, Introduction § 11, which is probably part of an addition inserted in 1260, decrees that a man who had “carnal dealings with a farm beast” *ipso facto* invalidated his “rights as a Christian” (*spillir svá kristni sinni*).¹²⁶ By doing so he was considered to have turned his back on his Christianity, therefore placing himself outside Christian society.

It seems that the distinction of whether a sexual act was defined as heretic was not reflected on a death penalty as such, but rather it may have been reflected in the form of the death penalty. While for instance grave cases of incest are associated with heresy, I have never found that rapist and adulterers were designated as heretics. The (incestuous) heretics risked burning on the stake—thus total elimination of the sinner and his sins, while I have never found rapists and adulterers who were executed (or threatened with execution) in this way. Thus some element of clean/unclean ideas seems to be linked with “heretic” sexuality.

¹²³ For the Latin version and translation into Norwegian. See *NoMiddalddok*, pp. 142–143. (Here we also see that the Latin *heresies* is rendered into modern Norwegian *kjetteri*. For the Old Norse version see *NgL*, II, p. 470. *Uillu* and *uanthro* see *NgL*, V, pp. 715, 686.

¹²⁴ Brundage, *Law, Sex, and Christian Society*, p. 473.

¹²⁵ In the registers of fines of the account rolls for Romerike we read that Per Slatthem and Gunner Ramstadt were fined for heresy (*kiætterij*) in 1528, *NRJ*, IV, p. 338.

¹²⁶ According to *NgL*, V, pp. 598–599 *spilla* means to gamble away, pervert, and corrupt. *Frostatingslova*, ed. and trans. by Jan Ragnar Hagland og Jørn Sandnes (Oslo: Det Norske Samlaget, 1994), p. XXXI propose that the 13 first chapters should be attributed to an addition made by Håkon Håkonsson in ca. 1260.

As Vern L. Bullough puts it, while there was compassion and hope for salvation for “prostitutes and others who engaged in ‘sinful’ activities”, there was less tolerance for other groups such as homosexuals.¹²⁷ I will return to this issue in part B, “Punish and Purge”. Amongst those cases where the type of sexual crime associated with heresy is known, the majority of them concern grave cases of incest, also during the Middle Ages and post-Reformation sixteenth century.¹²⁸ For example, the short records made for Oslo lawthing in 1572 note four cases of incest. In sum, all these are characterised as *kettherij*.¹²⁹ According to Rudolf Thunander terms like *kjetteri* and *blodskam* lit. *bloodshame* were used to denote incest in seventeenth-century Sweden.¹³⁰

The concept of heresy had had a long history in Norway before the onset of the Reformation and was connected to the most morally reprehensible acts. In all cases from the period 1300–1600 when the heresy is specified, it is sexual, although an element of sorcery cannot be ruled out in one of these. Unspecified cases of heresy from the Middle Ages, 10 in total, are listed under the heading Unspecified Sexual Crimes. After classifying the cases of heresy from the post-Reformation sixteenth century according to their respective categories, 10 unspecified cases of heresy remain, all of which were found in the registers of fines in the fiefs’ account rolls. In all these cases it is obvious that the crime was considered extremely serious, since the fines recorded vary between 10 and 70 riksdalers and since in two cases there is evidence that the culprit was executed.

We know of several cases where one and the same person committed both sexual and other crimes, of which 6 date from the Middle Ages, and 6 from the post-Reformation sixteenth century. They are listed under the heading Sexual Crimes and Other Crimes.

Even though many decrees against extramarital sexuality were issued in the period between the Reformation and the *Norwegian Law* of 1687, to a very large degree they merely took up principles which

¹²⁷ Vern L. Bullough, ‘Postscript: Heresy, Witchcraft, and Sexuality’, in *Sexual Practices*, p. 217.

¹²⁸ Eline, who had lain with her brother-in-law, was called a *kæterske*, DN, III, no. 981, p. 714 [1492], and Nils Lykke’s relationship with the sister of his deceased wife was characterised as *kjetteri*. This case will be discussed more in part B.

¹²⁹ *Nils Stubs*, p. 8.

¹³⁰ Rudolf Thunander, *Förbjuden kärlek: Sexualbrott, kärleksmagi och kärleksbrev i 1600-talets Sverige* (Stockholm: Atlantis, 1992), p. 39.

had already been postulated by medieval legislation. The High Middle Ages witnessed the criminalisation of the complete spectrum of sexual misdeeds, including adultery, fornication, and prostitution. To round off this conclusion, we shall now examine how the principle of individual liability to prosecution was introduced at the same time.

CHAPTER TWO

INDIVIDUAL CRIMINAL RESPONSIBILITY

In this chapter I argue that the principle of individual criminal responsibility had characterised legislation already several centuries before the Reformation. I will show that the question concerning when various sexual acts were criminalised is connected to the introduction of the principle of individual criminal responsibility, and to the definition of these acts as sinful.

Criminal Responsibility and Sin

It has been argued that after the Reformation, the fight against sin and crime became two sides of the same coin.¹ In the following I argue that a similar battle had already been fought throughout the Middle Ages.

The provincial laws retain elements of an older legal system which has its roots in pre-Christian times. At that time it was the responsibility of the offended party to react to a breach of law or to an infringement of their rights and to bring this to the attention of the offender. Society remained passive in these matters. The offended party could claim compensation and the culprit's close relatives were collectively responsible for his or her deeds vis-à-vis the offended person and his or her family. The claim to compensation was therefore not connected to the question of individual guilt.

According to Knut Helle, one of the characteristics of the following period in legal development is that the breach of law began to be seen as a crime which society had to avenge if the parties involved were unable to do this themselves. Also society suffered an insult; one and the same

¹ Sunde, *Speculum legale*, p. 183; Gunnlaugsson, 'Sedlighetsbrott', p. 112; Sundin, 'Värdsliig pragmatism', p. 242; or in the words of Ylikangas et al., 'Family, State, and Patterns', p. 116, "God's commandments and the ambitions of the authorities are thus identical, just as crime and sin are synonymous".

act could therefore necessitate both compensation to the (primarily) offended part and a public punishment, fines or outlawry.²

Sverre Bagge discerns the introduction of the principle of public investigation in the earliest Christian laws, where it is stated that the bishop or his steward should take appropriate action.³ Parallel to this, the principle of individual liability to prosecution began to gain ground. Helle points out that individual culpability became fully accepted in high medieval criminal law (more on this in the following section). The focus on individual guilt was probably derived from canon law. As Henrik Stensborg and Ditlev Tamm note, it was via the influence of the Church that “[...] the culpability was gradually individualized”.⁴ Due to this, only the criminal and sinful individual was threatened with punishment and not his or her family.

Already the oldest Christian laws contain some sections which express that a criminal act was at the same time also a sinful one. In the so-called *Olafstext* in the *Old Christian Law of the Gulathing* a fine to the bishop, (*bæta við biskup*), usually went hand in hand with confession and penance, in the formulation “ganga til skripta ok bæta við Krist”.⁵ Also the younger Christian laws of the thirteenth century build upon this principle.⁶ This duplication in the legislation, defining one and the same act as both criminal and sinful, was probably inspired by Anglo-Saxon Church law. Absalon Taranger has shown that during St Olaf’s sojourn in England before he became king in 1015, a breach of Anglo-

² Knut Helle, *Norge blir en stat: 1130–1319*, Handbok i Norges Historie, vol. 3 (Bergen, Oslo, Tromsø: Universitetsforlaget, 1974), pp. 186–187.

³ Sverre Bagge, ‘Kirkens jurisdiksjon i kristenrettssaker før 1277’, *Historisk Tidsskrift* [Norway] 60 (1981), pp. 137–138, 152.

⁴ Henrik Stevnsborg and Ditlev Tamm, ‘Punishment in Scandinavia until the 18th Century’, in *La Peine, Recueils de la Societe jean Bodin pour l’histoire comparative des institutions* 56:2–3 (Brussels: De Boeck, 1989), pp. 78, 80.

⁵ This can for example be seen in the *Olafstext* in the *Old Christian Law of the Gulathing* § 24: “And if [a man] takes a wife of nearer [kin] than I have now indicated, (...) he shall pay a fine of three marks to the bishop and cease from the woman and go to confession and do penance.” *The Earliest Norwegian Laws*, p. 53. See for “ganga til skripta oc bæta við Krist” *NgL*, V, p. 129. Contrary to secular punishments such as fines, the level and type of penance is not specified. The *Old Christian Law of the Gulathing* attributes several paragraphs which also mention penance to King Olaf and Bishop Grimkell; §§ 7, 8, 20, 21, 23, 24, 28, 29. See also Bull, *Folk og kirke i mid-delalderen*, pp. 106–108 and 117, and *Medieval Handbooks of Penance. A Translation of the Principal Libri Poeniteniales and selections from related documents*. Records of Western Civilization, ed. and trans. by John T. McNeill and Helena M. Gamer (New York: Columbia University Press, 1938, reprint 1990), pp. 392–393, “Note on Penitential Provisions in Norse Law”.

⁶ See *NgL*, V, p. 583, *skript*.

Saxon Church law sometimes entailed supplementary secular punishment (if the culprit failed to obey Church penance). Sometimes there was only secular or only ecclesiastical punishment, yet most frequently both.⁷ Regarding this period Olav Tveito is even more specific, and he argues that Archbishop Wulfstan of York (elected Archbishop 1002, died 1023) exercised a considerable impact on the oldest Norwegian Christian laws. Thereby the archbishop's vision of establishing a holy society is echoed.⁸ This Anglo-Saxon pattern was the one chosen for the Norwegian Christian laws, and therefore do not differentiate clearly between penance and criminal law proper.⁹

In Anglo-Saxon England, the Latin word *crimen* commonly had moral connotations, often simply being synonymous with sin.¹⁰ Timothy Haskett explains that for the Middle Ages, the basis for justice and law was Christian theology and that God cannot simply forgive mankind their sins since this would upset universal order.¹¹ Medieval law developed on the basis of theological principles. Humans were seen as part of the universe's legal structure. In the name of righteousness, each sin needed to be atoned for through suffering on earth, with the suffering in relation to the extent of the sinful act. A certain payment had to be made in order to re-establish the order of law after a breach.

The principle that certain acts were both criminal and sinful was probably included in the law books in order to increase the understanding of these new teachings which were revolutionary for Old Norse society.¹² The interaction between law and theology, which is expressed in the

⁷ Absalon Taranger, *Den angelsaksiske kirkes indflydelse paa den norske* (Kristiania: Grøndahl & Søns Bogtrykkeri, 1890), pp. 299–300. See also Thomas Pollock Oakley, *English Penitential Discipline and Anglo-Saxon Law in their Joint Influence* (New York: Columbia University, 1923), p. 145.

⁸ Olav Tveito, 'Erkebiskop Wulfstan av York og de eldste norske kristenrettene', *Norsk Teologisk Tidsskrift* 3 (2007), pp. 171–186. I would like to thank Olav Tveito for bringing this relevant and interesting article to my attention.

⁹ Bull, *Folk og kirke i middelalderen*, p. 108.

¹⁰ John Hudson, 'Violence, Theft, and the Common law', in *Crime and Punishment in the Middle Ages*, ed. by Timothy S. Haskett (Victoria, British Columbia: Humanities Centre University of Colombia, 1998), p. 20.

¹¹ Timothy S. Haskett, 'Crime and Sin, Punishment and Justice', in *Crime and Punishment*, pp. 12–15.

¹² It was considered important to promulgate the new ideas amongst the population, as the surviving collection of sermons, the *Old Norwegian Homilybook*, shows. The extant manuscript dates to ca. 1200–1220 although the text itself is older, and the majority of the sermons date from the first half of the twelfth century. Adultery is for example decried as a serious sin, see discussion by Aud-Jorunn Sandal, 'Synd i Gamalnorsk homilieboek og Islandsk homilieboek' (unpublished dissertation (hovedoppgave), University of Bergen, 1996), pp. 9–11.

Norwegian Christian laws, was, as succinctly put by Thomas Pollock Oakley, a common approach when new ideas were introduced in early medieval Europe.¹³ The following explanations by Pollock Oakley can help us understand the relationship between the sinful and the criminal aspects of one and the same act:

In contrast to our present practice, the secular laws of that time constantly reiterated that crimes were sins, and that secular penal law had a religious, as well as a punitive purpose. In addition to crimes being wrongs committed against individuals or the State, crimes were also regarded as defiling the soul of the offender.¹⁴

It is consequently beyond any doubt that since the very beginnings of Christian law codification in Norway, control of sin went hand in hand with control of crime. By decreeing that a criminal act was not merely a matter for the bishop and in certain cases also the king's justice, but in addition a sinful act in the eyes of God, legislators were including important principles from the penitentials.

The influence also worked the other way. There are surviving penitentials which in addition to penance prescribe fines, something which clearly shows legislative influence. A good example is the penitential of Bishop Jørund of Hólar (1267–1313), and which was subsequently confirmed by two later bishops of Hólar, Laurentius Kalfsson (1323–1331) and Egil Eyolfsson (1331–1341).¹⁵ Penitentials prescribing fines and penance for one and the same act probably had more than a mere moral agenda. Considerations of practicability must have been involved. Precisely because sin could also have criminal aspects, it saved time and effort for the bishop and culprit to deal with the spiritual and the secular aspects of the deed at the same time, concluding the affair once and for all. Such agreements are described by the technical term *yfirbót*.¹⁶ In Norway, the Crown deliberately attempted to curtail the practice of *yfirbót*, since it was feared that the Church would try to retain more than its due share of the fines in cases involving serious breaches of

¹³ Thomas Pollock Oakley, 'The Cooperation of Medieval Penance and Secular Law', *Speculum Journal of Medieval Studies* VII (1932), p. 518. Regarding Anglo-Saxon penitentials and Anglo-Saxon law Oakley, *English Penitential Discipline*, has thoroughly demonstrated how these interplayed with each other.

¹⁴ Oakley, 'The Cooperation', pp. 516–517.

¹⁵ *DI* II, no. 8 and *DI* II, no. 61. Translation in part in *Medieval Handbooks of Penance*, pp. 354–360.

¹⁶ Seip, *Sættargjerd*, p. 42.

the Christian laws.¹⁷ However, to some extent the practice continued throughout the Middle Ages.¹⁸

Edvard Bull, who considered Norwegian confessions in depth, proposes that “*bæta við Krist*” refer to a public penance (*poenitentia publica*) in cases of serious breaches of the Christian laws. According to Bull this was a traditional form of penance in Norway. He thinks that Bishop Thórlákr of Skálholt’s penitential contains regulations concerning public penance. He also explains that it would be pointless to punish a crime through private confession and penance after a public judgement had been passed at the assembly.¹⁹ Archbishop Pål’s third statute (between 1336 and 1346) considered having the sinner stand outside the church to be public penance (*openberre skript*).²⁰ Bull refers to a papal letter from 1297 which mentions the *publice penitentes* which *ab antiquo* (meaning, following Bull, at least for a few generations) used to enter the Cathedral at Nidaros.²¹ A corresponding statement of the provincial council of 1436 says that those who had to make a public confession were to do so in the front of the cathedral at a fixed time and the bishop or his representative was to take the confession.²²

The Fourth Lateran Council of 1215 finally decided that public confession was appropriate for public sin, and private confession for secret

¹⁷ In 1280 it was formulated that only priests who were not associated to a parish church and who could not take secret confession could be provosts; *NgL*, III, p. 5: “at þeir prestar hafa provast dome er eigi hafa soknar kirkjur oc loynlig skripta mal”. The reason was probably to prevent priests from misusing the confessional by also collecting fines. The decree of 1392, *NgL*, 2rk, I, p. 23 notes under point 2 that the king’s claims in cases of outlawry according to the Christian laws were not reduced even if the culprit confessed and *yfirbót*, because he was outlawed *ipso facto* “af sialfuum værkum”.

¹⁸ *DN*, II, no. 128, pp. 110–111, from 1317 concerns a woman who had been illegally cohabitating with a man for a long time. When this Groa eventually appeared before the Bishop of Oslo and Sira Torkel, overseer of penances, she desired to do penance and pay fines (*bad sik til ifuirlota*) for her acts. According to a written settlement between Groa and the priest she was to pay a fine to the Church. In addition, Sira Torkel imposed a *skript*, i.e. a penance on her. Another diploma from 1395 shows that a woman simultaneously promised to confess to adultery and to pay a fine of half a *markebol* to Bishop Eysteinn of Oslo. (A *markebol* is landed property to the value of one mark.) *DN*, XXI, no. 190, pp. 145–146; no. 198, p. 152.

¹⁹ Bull, *Folk og kirke i middelalderen*, pp. 107–109.

²⁰ Bull, *Folk og kirke i middelalderen*, p. 127. *NgL*, III, p. 286. According to Bull episodes from the sagas indicate that public penance had probably been used from Christianity’s infancy in Norway.

²¹ Bull, *Folk og kirke i middelalderen*, p. 128.

²² Halvor Bergan, *Skriftemål og skriftestol: Skriftemålet i Den norske kirke fra reformasjonstiden til i dag* (Oslo, 1982), p. 35; *DN*, V, no. 660, p. 469.

sin. This rule was also implemented in the younger Christian laws.²³ On the whole, according to Bull, the old forced public penance was retained only for very grave sins, like the very public crime of marriage within forbidden degrees of kinship. Bull notes that in the course of time the obligatory yearly *poenitentia privata* made public penance in the main superfluous.²⁴

The Reformation brought changes to the framework of penance. Several of the reformers in Germany suppressed secret confession as an ecclesiastical procedure. It was sufficient, so the argument ran, to confess to God directly and to the victim of one's sinful act.²⁵ Martin Luther was in favour of Church discipline since he considered it established by Christ, but Luther underlined that such discipline was to be an act of grace, not a punishment. The sinner was to be guided back into the Church's community exclusively via spiritual means, that is, annunciation of God's word and exclusion from communion.²⁶ Luther opposed obligatory secret confession, which had been due at least once a year since 1215; instead he favoured voluntary secret confession. In addition, the practice that people could atone for their sins through acts of penance was abolished; Luther favoured prayers, fasting and almsgiving.²⁷ Luther also intended to dispose of penitentials. He denied that all conceivable sins needed to be listed in writing, replacing this by an order to obey the Ten Commandments.²⁸

The church decree of 1539 states that open heinous sinners, who were notorious *witterlige*, had to make a public confession, while concealed, *lønnlige* sinners were to make a private one.²⁹ The regulation is in agreement with the decision of the Fourth Lateran Council in 1215. Jens Nilssøn, superintendent (bishop) of Oslo and Hamar 1580–1600,

²³ Bull, *Folk og kirke i middelalderen*, pp. 129–130; NB § 14; NG 22, *NgL*, II, pp. 299, 318.

²⁴ Bull, *Folk og kirke i middelalderen*, pp. 129, 131.

²⁵ Bergan 1982, pp. 32–37. Based on Matthew 18, 15–17, which also otherwise legitimised the practice of medieval penance. Luther was of the opinion that the pope had wrongly appropriated God's right to decide on salvation or perdition. In addition, ecclesiastics had abused excommunication in order to support their own power and to collect fines. In Luther's view, the Church's right to judge and excommunicate could not influence people's relations with God, for which the only decisive factors were faith or infidelity.

²⁶ Bergan, *Skriftemål og skriftestol*, p. 26.

²⁷ Bergan, *Skriftemål og skriftestol*, pp. 64–65.

²⁸ Bergan, *Skriftemål og skriftestol*, p. 201.

²⁹ Bergan, *Skriftemål og skriftestol*, p. 30. The medieval Catholic Church considered individual confession secret *confessio secreta*, as did Luther. The church decree of 1539 has a secret *lønlig* confession.

understood the decree of 1539 to mean that adulterers should make a public confession in church (*tage scrifft aabenbarlige i kircken*), while previously respectable youngsters who had had sexual relations could be absolved in private.³⁰ It follows that the church decree prescribed public confession in front of the entire congregation for all who were guilty of open heinous sins and for those who were to be excommunicated. Reconciliation was to be effected publicly during high mass via confession and forgiveness, and after which the sinner was permitted to take part in communion again, thus rejoining the congregation.

Bergan argues that during the seventeenth-century period of orthodoxy the regulation of Church discipline became far more widely and severely applied.³¹ Heikki Pihlajamäki describes a similar development in Sweden.³² Originally, public confession after the Reformation had a more supportive character, in that the sinner was to be forgiven and, with the help of God's word, guided back into the Christian community. During the course of the seventeenth century it became more important to force the sinner to be obedient, also as a means to warn others.³³ Regarding this increased severity of Church discipline during the seventeenth century; Bergan comments that this was a return towards the medieval variety.³⁴

As an example of this stricter attitude regarding Church discipline Bergan quotes the Norwegian church decree of 1607 which prescribes that the sinner's name was to be called out from the pulpit.³⁵ Telste discusses the use of humiliation by the public announcement of the sin, particularly in connection with late seventeenth and early eighteenth century sources.³⁶ Let us now turn back to the High Middle Ages, to a case of adultery from 1305. There, the bishop of Bergen ordered that the excommunication of Erling Haldorsson, who had had a relationship with

³⁰ Bergan, *Skriftemål og skriftestol*, p. 42.

³¹ Bergan, *Skriftemål og skriftestol*, p. 48.

³² Pihlajamäki, Heikki, 'Executor divinarum et suarum legum: Criminal Law and the Lutheran Reformation', in *Lutheran Reformation and the Law*, ed. by Virpi Makinen (Leiden: Brill, 2006), p. 200. Pihlajamäki notes that the same tendency is also discerned for different parts of Germany.

³³ Bergan, *Skriftemål og skriftestol*, p. 48; Telste, *Mellom liv og lov*, pp. 96–97.

³⁴ Bergan, *Skriftemål og skriftestol*, p. 48.

³⁵ Bergan, *Skriftemål og skriftestol*, p. 239, note 11.

³⁶ Telste, *Mellom liv og lov*, pp. 96–97. Confession followed certain fixed rules. As a first step the priest proclaimed from the pulpit that someone had sinned against one of the Ten Commandments, which gives offence to the congregation. Unmarried mothers were always to be asked who the father of the child was. Cf also Bergan, *Skriftemål og skriftestol*, p. 46.

another man's wife, was to be announced in front of the congregation each Sunday and each church holiday until Erling Haldorsson confessed and did *yfirbót*.³⁷ Consequently, the use of humiliation by the public announcement of the sin was already very much a technique used by the medieval Church.

When comparing the Church decrees of 1537/1539 with the Church decree of 1607, Bergan finds that the latter has some interesting additions. The chapter on confession and forgiveness includes the rule that "priests should not take payment or other kinds of remuneration from people who confessed."³⁸ One might ask whether this formulation shows resonances of the medieval *yfirbót* or of the severely criticised practice of selling indulgences.

Yet another element, which Bergan argues led to harsher Church discipline during the seventeenth century, was the intermingling of "den kirkelige og den borgerlige lovgivning"³⁹ [the ecclesiastical and secular legislation]. A typical example of this is the *Ordinance against loose living* of 1617, which prescribes public confession as well as a fine to the king.⁴⁰ However, compared to the medieval Christian laws, which state that God, the bishop and possibly even the king, were to receive their due in the shape of penance and fines, such a decree is not in the least a novelty.

As Bergan emphasises, post-Reformation Church discipline shows certain characteristics which remind us of the discipline enforced by the Church, through confession and penance, during the Middle Ages. In Part B of this work, *Punishment*, we take a closer look at the sexual crimes which provide information concerning medieval penance and post-Reformation Church discipline.

The Medieval State and the Growth of Individual Criminal Responsibility

Historians of the Early Modern Period connect the principle of individual criminal responsibility to the development of the modern state. According to this view, in the Middle Ages extramarital sexuality was

³⁷ DN, VIII, no. 16, pp. 27–28.

³⁸ Bergan, *Skriftemål og skriftestol*, p. 80.

³⁹ Bergan, *Skriftemål og skriftestol*, pp. 43, 48.

⁴⁰ *Danske Kirkelove*, vol. 3, p. 62.

resolved when the woman's male relatives and her lover reached an agreement concerning the compensation to be paid by the latter.⁴¹

Family had an important role in earlier Norwegian society. The oldest extant laws on sexual relations show that it was the responsibility of men to act if women under their protection became the objects of unwanted sexual attention. The problem was first and foremost the issue of gaining control of women's sexuality, since this was connected to important questions involving family honour, legitimate heirs and transfer of property, and for the elite, it was also connected to political alliances. According to Early Medieval Norwegian law, a man who had sexual relations with any other woman but his own wife risked being killed, and the surviving regulations are clearly defined.⁴² They specify for which women a man could exact revenge, when (immediately) and against whom (exclusively the sexual partner and not his family). It is possible that exposure to Anglo-Saxon legislation was the inspiration for this rule.⁴³ The right to kill in order to gain revenge, which was part of the legal protection afforded to a free person, has its roots in pagan times and this right did not vanish overnight when Christianity gained political acceptance. For the offended party compensation was a less honourable option. As an illustration regarding these "ethics of revenge", Per-Edwin Wallén points to episodes in the sagas where people complain that they do not want to carry their killed relatives in their purse.⁴⁴ The mentality is also explicitly stated in the *Old Law of the Gulathing* which states that a person had the right to compensation only three times—unless he had avenged the wrong in the meantime.⁴⁵

⁴¹ Ylikangas et al., 'Family, State, and Patterns', pp. 111–123.

⁴² I have discussed this aspect of the legislation in Anne Irene Riisøy, 'Komparativt blikk på "verdslig" rett i Eldre Borgartings kristenrett', in *Østfold og Viken i yngre jernalder og middelalder*, ed. by Jón Viðar Sigurðsson and Per G. Norseng (Oslo: Unipub Forlag, 2003), pp. 163–167. The right to kill for revenge in the provincial laws of the *Gulathing*, § 160 and the *Frostathing* IV § 39, list seven women, (*NgL*, I, pp. 62–63, 169–170), *The Earliest Norwegian Laws*, pp. 132; 273–274. The *Old Christian Law of the Borgarthing*, version II, § 15, (*NgL*, I, p. 358) lists an astonishing thirteen women for *lendmenn* and *haulder*, with proportionally fewer women the further one descended the social ladder.

⁴³ Helle, *Gulatinget*, p. 35, note 89, points to the fact that the Anglo-Saxon King Alfred (871–90) decreed that a man who was caught in the act with another man's wife, daughter, sister or mother could legally be killed. *The Laws of the Earliest English Kings*, ed. and trans. by F. L. Attenborough (Cambridge: Cambridge University Press, 1922, repr. 2000), p. 85.

⁴⁴ *KL*, VII, p. 245.

⁴⁵ G § 186, (*NgL*, I, p. 68), *The Earliest Norwegian Laws*, p. 140.

In addition, female slaves and servants were under the authority of the *pater familias* with regard to their sexuality, but in their case family honour was not considered to have been insulted to such a degree that it justified killing. Rather, the head of the family could claim economic compensation in proportion to the woman's position within the household.⁴⁶

However, it was not sufficient merely to be in the right. In order to enjoy the practical consequences early medieval people needed to be able to mobilise support. In the absence of a strong state, a person who required protection was to a large degree dependant on family members, or perhaps also friends and political supporters. Dagfinn Skre and Sverre Bagge support and further discuss Axel Sommerfelt's hypothesis that Old Norse society distinguished between relatives with and without a claim to inheritance when help to avenge a killing needed to be enlisted.⁴⁷ In other words, being in the position of heir entailed certain obligations. In the Early Middle Ages sexuality was regulated by a comparable normative framework. A man's right to inherit from female relatives was explicitly limited to those women for whom he had to protect from sexual advances by other men.⁴⁸

Vengeance however, could easily lead to feuds and unrest. Both Church and Crown therefore supported efforts to curtail acts of revenge, to focus on the right to claim economic compensation, and to limit the responsibility of the extended family when solving conflicts. In Norway legislation to ensure the King's Peace, a common European phenomenon, was stepped up during Magnus Erlingsson's reign in the 1160s.⁴⁹ This included attempts to curtail violence and self-help. People who broke a

⁴⁶ G § 198, see also F XI 21, (NgL, I, pp. 70–71; 234), *The Earliest Norwegian Laws*, pp. 143–144; p. 369.

⁴⁷ Dagfinn Skre, *Herredømmet: Bosetning og besittelse på Romerike 200–1350 e. Kr.* (Oslo: Universitetsforlaget, 1998), p. 15; Sverre Bagge, *Society and politics in Snorri Sturluson's 'Heimskringla'* (Berkeley: University of California Press, 1991), p. 113. Axel Sommerfelt, 'Comments on Economic Structures in the Early Iron Age', *Norwegian Archaeological Review* 7 (1974), p. 145 shows that in Iceland it was the right to inherit rather than the degree of kinship which determined who should initiate revenge. Bagge finds indications for similar principles for Norway.

⁴⁸ B II 15, (NgL, I, p. 358) extant in a manuscript of the *Old Christian Law of the Borgarthing*, links the right to kill in revenge to the right to inherit (*Allar þær konor er madr stendr til arfs æftir*). In *Gulathing*, G § 197, (NgL, I, p. 70), *The Earliest Norwegian Laws*, p. 143, the right to inherit is limited to those women a man could ask economic compensation for. These rules have been further discussed by Handeland, 'I lyst og last', pp. 47–50; Riisøy, 'Komparativt blikk', pp. 163–167.

⁴⁹ Helle, *Norge blir en stat: 1130–1319*, p. 86; Helle, *Gulatinget*, pp. 95, 100–101.

legal settlement which had resolved cases of murder and sexual crimes forfeited both property and peace.⁵⁰ After 1260, acts of vengeance against innocent members of a killer's family entailed outlawry and it became obligatory to accept an offer of settlement.⁵¹ It is this section in particular which illustrates that the tendency to enforce the concept of individual culpability accelerated during the reign of Håkon Håkonsson.

Magnus the Law-mender went even further, and the *Landslaw* establishes a radically new legal framework for settlements of civil cases. With the stroke of a pen the legal possibility of revenge was removed. In cases of manslaughter the *Landslaw* stipulates that compensation was to be paid exclusively by the killer to the victim's closest relative. With this the responsibility of the extended family had come to an end and individual criminal responsibility was formulated in such cases.⁵² The number of people involved in a case was drastically reduced by the *Landslaw* at the same time as the earlier *frændbætr* [wergeld] that is compensation due from the killer's kin to the victim's kin, were abolished.⁵³

In the context of this work, it is necessary to examine more closely concomitant limitations of the control of women's sexuality exerted by male relatives. With the *Landslaw* the right to seek economic compensation became the only option in cases of fornication and adultery. At once, male relatives were also operating within a new legal framework regarding the number of women who were under their authority in terms

⁵⁰ G § 32, (NgL, I, pp. 19–20), *The Earliest Norwegian Laws*, pp. 58–60. Cf (F V 44–46), and in F V § 44, (NgL, I, p. 182), *The Earliest Norwegian Laws*, p. 290 we find: "These new ordinances were adopted with the consent of King Magnus and Archbishop Eystein and other bishops and the most prudent men of all the jurisdictions, namely, that all those who violate the pledges of peace and security which men give each other in cases of manslaying are to go into permanent outlawry and shall forfeit peace and property, land and movables, odal as well as other [land]."

⁵¹ F intro. § 8, (NgL, I, p. 123), *The Earliest Norwegian Laws*, p. 216. According to Hagland and Sandnes, *Frostatingslova*, p. XXXI this paragraph was an addition made by King Håkon Håkonsson, possibly in 1260.

⁵² Steinar Imsen in the article on punishment, 'Straff', in *KL*, XXI, pp. 319–320, and Helle, *Norge blir en stat: 1130–1319*, p. 186. L IV 12, (NgL, II, p. 58), *Magnus Lagabøters landslov*, pp. 53–54.

⁵³ The older system of wergeld defined a closer group of relatives as those having the responsibility for paying compensation in cases of murder committed by someone in their family. Simultaneously, the same group of relatives had the right to receive compensation in case one of their members was killed. The paragraph in the *Old Law of the Gulathing* on accepting wergeld § 227, (NgL, I, p. 77) also lists distant relatives, cf also F VI § 7, (NgL, I, p. 185), *The Earliest Norwegian Laws*, pp. 154–155; pp. 295–296. The *Landslaw* X 2–5 abolishes the family's responsibility in case of murder committed by one of their number, as Absalon Taranger in *Magnus Lagabøters landslov*, p. 193 formulates.

of sexual matters. The *Landslaw* accords a man the right over merely four women: a man's wife, daughter, mother and sister, while according to the older provincial laws a free man's rights to seek compensation or take revenge extended over seven to fifteen women.⁵⁴

In addition, the *Landslaw* states that the amount of compensation to be paid to a woman's closest male relatives was to be determined by men legally appointed by the king's steward.⁵⁵ The *Norwegian Law* of 1604 is also based on these principles.⁵⁶ It is also worth noting that the right to compensation by the *Landslaw* and the later *Norwegian Law* of 1604 is connected to the right to inherit.⁵⁷ This is wholly in agreement with the older legal principles regarding the right to revenge in such cases which have been discussed above.

It is possible that the *Landslaw's* procedure for determining the amount of compensation—the woman's lover had to pay according to his financial ability—was inspired by Church rules. A century earlier Bishop Thórlákr of Skálholt's penitential stated that a rich person was to be punished more harshly than a poor one for the same sin, and as mentioned, Thórlákr's focus was overwhelmingly on sexual sins. In the same vein, a healthy, educated, high-born, lucky and adult sinner was to suffer more than a sick, uneducated, low-born, unlucky and youthful one.⁵⁸ The reason was not only that God observed and passed judge-

⁵⁴ L IV 4 og L IV 5, (NgL, II, pp. 51–52), *Magnus Lagabøters landslov*, pp. 46–47. It seems that the right to seek revenge in the more grave cases of abduction of women and rape was continued.

⁵⁵ According to Absalon Taranger *Magnus Lagabøters landslov*, p. 68 the first sub-paragraph in L IV 27 (25b), (NgL, II, p. 70) is new. It states that a man guilty of such a gross indecency as sleeping with another man's wife had to pay compensation to her husband. The level of compensation was to be determined by 12 men who had been legally appointed by the *réttari*. The second sub-paragraph, taking up rules from the so-called *Law on the King's Peace* of 1163/64, G § 32, rules on breaches of peace committed by the two men. NgL, V, p. 516 *réttari* was introduced to the *Landslaw* as a term for the representative of the public prosecution and executive power in criminal cases.

⁵⁶ *Kong Christian den Fjerdes norske Lovbog af 1604*, III 22 (wife) and III 25 (unmarried women, *møer eller quinder*), pp. 65, 67–68.

⁵⁷ L IV 30 (29), (NgL, II, p. 72), *Magnus Lagabøters landslov*, pp. 70–71.

⁵⁸ DI I, no. 43, pp. 242–243: "Meira skal bода aa uallt firir jafna synd audgum en aumum. meira heilum en uanheilum. meira lærdum en oolærdum. meira meir uijgdum en midr uijgdum. Meira sælum en ueslum. Meira eldrum en tuitogum en þeim en yngri ero." Translation in *Medieval Handbooks of Penance*, p. 356: [A rich man shall always be more severely punished than a poor man for the same sin; the hale, than the sick; the learned, than the unlearned; a man of superior, than a man of inferior rank; a fortunate man, than an unfortunate; and adult, than one of minor age].

ment independently of earthly rank, but also that “the strongest” should be chastised most severely. Consequently, the *Landslaw* is probably based on an ecclesiastical principle which was diametrically opposed to earlier rules concerning the compensation paid by the lover, where the amount had been determined by the social class of the woman’s family. Compared to previous legal principles, in cases of sexual crimes and murder the formal legal position of the family was significantly weakened in 1274. All 35 cases known to us where men had to pay compensation for sexual relations between 1300 and 1500 were dealt with by what can be called the public authorities, either by the local *thing* assemblies, at meetings with jurors, or in front of the lawman and the lawthing.⁵⁹

Already our earliest Christian laws bear witness to a close relationship between an act’s criminal and sinful aspects, a connection which was probably introduced and encouraged by both Crown and Church. These earliest Christian laws show clearly that a person guilty of a criminal and sinful act needed to make amends vis-à-vis both God and public authorities. Individual criminal responsibility can therefore be linked to the rise of the medieval State, Crown and Church—and not to the modern State, as historians of the Early Modern Period argue. The *Landslaw* of 1274 was the last and decisive attack on the family’s rights to conflict-solving actions, and this final transition from revenge to economic compensation is an expression of the success with which the medieval State came to enjoy as the guarantors of peace.

⁵⁹ For instance in 1482 the lawman of Stavanger and 5 other men helped Torkel and Håvard to reach a settlement with Mikkel who had made their sister-in-law pregnant, *DN*, II, 290, pp. 680–681, and above in Chapter 1, I have discussed Haldor who had slept with Halvors wife, for which he had to pay 30 cows to the cuckolded husband.

CHAPTER THREE

THE FINAL CRIMINALISATION OF SEXUAL ACTS IN THE HIGH MIDDLE AGES

The above discussion has shown that laws issued against sexual crimes during the period 1537 to 1687 to a very large degree follow principles which had been defined already by medieval legislation. We have also seen that the most common sexual crimes, adultery and fornication, had been criminalised already during the Middle Ages; contrary to the widespread belief, they were *not* exclusively matters of civil law. Admittedly, some minor changes were made in this sphere of legislation after the Reformation. Sexual relations between so-called spiritual relatives, for example between godfathers or godmothers and their godchildren, were no longer classified as incest. The new definition of incest also limited to the third degree of kinship, and the comprehensive medieval prohibitions of sexual relations on a large number of certain days were abolished. Consequently, one might even argue that we witness the opposite tendency, being that after the Reformation criminalisation of sexual acts declined rather than increased. However, the difference is not significant.

It seems that the theory of the great break at the time of the Reformation took hold because few historians—in any case, few social and legal historians—carried out studies across traditional chronological divides. Also the increasing specialisation amongst historians, which separated medievalists from historians of the Early Modern Period, proved fertile soil for what we may call professional stereotypes.

In addition to the problems concerning the criminalisation of various sexual acts, there are the questions concerning individual criminal responsibility and aspects of the connection between sin and crime. We have seen how the claim stating that individual liability to prosecution was first introduced by the post-Reformation state cannot be supported. In addition, criminal deeds had been associated with sin since the Early Middle Ages.

Chapter 1 has shown that a whole spectrum of sexual acts had been criminalised long before the Reformation. When Christianity was politically accepted in Norway during the first half of the eleventh

century, violations of Christian moral norms were criminalised by new legislation, the Christian laws and accepted by the lawthings. Here, a particularly important role was played by St Olaf and his Anglo-Saxon bishops, especially Grimkell, who had arrived from England. The so-called *Olafstext* in the *Old Christian Law of the Gulathing*, the *Old Christian Law of the Frostathing*, and a number of sagas make direct reference to their legislative activities.¹

In the *Old Christian Law of the Gulathing* prohibitions of incest, bigamy, sexual activity on certain days of the week and year, and bestiality is found in the *Olafstext*, which means that they were introduced before the revision in 1163/64;² while the *Old Christian Law of the Frostathing* F III § 1 refers to the legislative activity at the *Mosterthing* in Sunnhordland during the early 1020s.³ It is likely that an excerpt of these *Christian Laws* was presented to the assemblies in western Norway immediately after the *Mosterthing*.

At the same time as certain sexual acts were criminalised, the principle of public prosecution was introduced and individuals became liable to criminal prosecution. This latter aspect has been discussed in Chapter 2; *Individual Criminal Responsibility* where the relationship between individual criminal responsibility and the aspects of sin in criminal acts has been shown. An individual's soul needed to be purged from sin and this same criminal individual had to be brought in front of a court to suffer secular punishment. This double principle of expiation to God, to the bishop and possibly also to the king which characterises the Christian laws from the very beginning, is probably inspired by Anglo-Saxon Church laws.

In the initial stages, the criminalisation of sexual acts cannot have been much more than a theoretical programmatic statement. The possibilities of implementing the new laws must have been rather limited and some of the new principles would not easily have gained acceptance. For example the definition of incest was extremely wide and at conflict with traditional concepts.⁴ Also acts which had not been stigmatised before,

¹ See discussion in the Introduction.

² §§ 24, 26, 25, 27, 30, (NgL, I, pp. 15–17, 30), *The Earliest Norwegian Laws*, pp. 53–54, 57–58.

³ (NgL, I, p. 147), *The Earliest Norwegian Laws*, p. 245. Besides the *Old Christian Law of the Gulathing*, §§ 10, 15, 17 explicitly refer to Grimkell (NgL, I, pp. 7–10), *The Earliest Norwegian Laws*, pp. 42, 44–46.

⁴ When the papal envoy Nicolas Brekespeare visited Norway in order to establish

and which had concerned a rather limited group of male elites, such as polygamy and the keeping of concubines, became criminal acts.⁵ An important step forward on the road to criminalising the whole spectrum of extramarital sexuality was probably made with the establishment of the archbishopric in the mid-twelfth century and with the growing influence of canon law that it entailed. Also, in all likelihood the possibilities to apply the laws increased during the course of time. Church organisation became more and more refined and several generations would have grown up under the influence of Christian teachings and practice, regulated by the Christian laws.

Also during the second half of the twelfth century new rules regarding marriage and its conclusion were introduced in the North. The requirement of individual consent, the prohibition of divorce and the rule of celibacy for clerics all touched on sexual matters and came to contribute to a further diversification of sexual crimes. As Gunnes has shown, the strong influence of canon law during Archbishop Eystein's revision of the *Old Law of the Frostathing* in the 1170s is palpable.⁶ Amongst others, Eystein probably prohibited adultery and fornication.⁷ Also during the council and synod in Bergen in 1163/64 important changes were made to the *Old Law of the Gulathing*, in particular to its *Christian Law*.⁸ Rape of women and homosexuality was criminalised.⁹ At the same time revisions and precisions were made to extant legislation; for example, the prohibition of incest was more clearly defined, and

the Church Province of Nidaros, he forced the womanising King Sigurd (1136–1155) to conclude a compromise with him. Erik Gunnes assumes that the reason for this lay less in Sigurd's general relations with women, but rather in the particular one with his cousin Kristin, daughter of King Sigurd. Gunnes, *Erkebiskop Øystein*, p. 60. King Harald (1046–1066) for example married Eillisiv in *Gardariki*, when he was already married to another woman. This unions was in direct contravention § 25 of the *Old Christian Law of the Gulathing* (NgL, I, p. 16), *The Earliest Norwegian Laws*, pp. 54–55, prohibiting bigamy.

⁵ Margaret Clunies Ross, 'Concubinage in Anglo-Saxon England', *Past and Present* 108 (1985), pp. 3–34 shows that relations with several women and polygamy by the male elite were not uncommon in pagan and early Christian Europe. In this respect, Scandinavia is no exception.

⁶ Gunnes, *Erkebiskop Øystein*, pp. 149–171. Erik Gunnes, 'Erkebiskop Øystein som lovgiver', *Lumen* 39 (1970), pp. 127–149. Erik Gunnes, 'Erkebiskop Øystein og Frostatingsloven', *Historisk Tidsskrift* [Norway] 52 (1974), pp. 109–121.

⁷ *Erkebiskop Øystein*, p. 160.

⁸ *Gulatingslovi*, ed. and trans. by Knut Robberstad (Oslo: Det Norske Samlaget, 1937), p. 12.

⁹ G § 32, (NgL, I, pp. 19–20), *The Earliest Norwegian Laws*, pp. 59–60.

the number of crimes which entailed outlawry increased.¹⁰ Similar to the *Old Law of the Frostathing*, Archbishop Eystein probably played an important role here as well, even if compared to this the *Old Christian Law of the Gulathing* is less clearly influenced by newer canon law.¹¹ In other areas the *Old Christian Law of the Frostathing* betray their origin in a geographical region where the Church enjoyed particular political weight as well. The archbishop was conceded the exclusive right to all confiscated property in cases of outlawry. Also from the mid-twelfth century on the Church was—at least in parts of the country—able to set up an organisational structure based on the parish-system and later also on provosts. To a certain degree this structure also had jurisdiction in cases of breach of the *Christian laws*.

By the late twelfth century in the region of the *Frostathing* there are strong indications that the Church competed with secular authorities to exert jurisdiction in cases under Christian law, but whether these concerned sex, sorcery, fasting or feasting, we have no way of knowing; legal records are lacking. However what is important to show, is that the concept of crime and punishment may have begun to take root.

During the Middle Ages, fines incurred due to infringements of the Christian laws were claimed by the archbishop and the bishops. *Sverris Saga* describes how during the reign of Magnus Erlingsson the archbishop managed to arrange a particularly advantageous agreement, probably with the assembly at the *Frostathing*. Fines to the archbishop were to be paid according to their value in silver and not at face value such as fines to the king.¹² The saga's information is corroborated by a section in the *Old Christian Law of the Frostathing* noting which fines the archbishop was entitled to and how they were to be calculated.¹³ When consent was given to the archbishop confirming that fines to the Church were to be paid in their value in silver and not at face value, this amounted to approximately a two-fold increase at the then current

¹⁰ G § 24, (NgL, I, pp. 24–25), *The Earliest Norwegian Laws*, pp. 53–54 expands the list of which people the prohibition concerned. See also Helle, *Gulatinget*, pp. 99–101.

¹¹ Gunnes, *Erkebiskop Øystein*, pp. 151–152. The *Magnustext* of the *Old Christian Law of the Gulathing* does for example not criminalise adultery and fornication, which was probably introduced during Archbishop Eystein's revision of the *Christian Law of the Frostathing*.

¹² This conflict is described in *The Saga of King Sverri of Norway* (*Sverrisaga*), trans. by J. Sephton (London: David Nutt: 1899, repr. Llanerch Publishers, 1994), pp. 140–141, chapter 112, year 1189.

¹³ F III § 2, (NgL, I, p. 148), *The Earliest Norwegian Laws*, p. 246.

course. Neither Magnus Erlingsson's father Erling Ormsson Skakke, nor King Sverre Sigurdsson, was particularly enthusiastic about this agreement. The agreement led to discussions between Erling Skakke and the archbishop. Erling considered such an increase in fines in cases of breach of the Christian laws to be against the laws of St Olaf, while the archbishop thought that the laws of St Olaf did not forbid an increase of God's rights.¹⁴ The matter continued to be a bone of contention under King Sverre Sigurdsson, as appears amongst other from Pope Celestine III's letter of privileges from 1194. The pope prohibited kings and chieftains to change the written laws of the land or to change the fines *pecuniarias penas* against ancient custom and to the detriment of the Church or clerics unless the bishops and wise men consented.¹⁵ A response by Pope Celestine III in 1196 to a complaint addressed to him by the chapter of Nidaros tells us that laymen passed sentences in matters regarding *spiritualis iurisdictio*.¹⁶ These so-called "spiritual cases", cannot be anything other than cases concerning a breach of the Christian laws.¹⁷ Sexual crimes may have constituted a large element of these.¹⁸

If the long lines of history are considered, it is obvious that Crown and Church shared a common interest in maintaining peace and acceptable authority.¹⁹ The level of legislation that was to ensure the King's Peace, which, as mentioned earlier, was a general European phenomenon, increased during the reign of Magnus Erlingsson and continued to do so during King Sverre's reign (1177–1202).²⁰ During the initial period of Archbishop Eirik's term of office it seems likely that a certain understanding was reached between him and King Sverre, since together both men issued a decree on the King's Peace in 1188/89. One of the new regulations intended to increase legal security stipulated that rapists forfeited their entire property to the king and bishop and that they were to be outlawed.²¹

¹⁴ Gunnes, *Erkebiskop Øystein*, pp. 89–93.

¹⁵ Pope Celestine III's letter of privileges from 1194, *DN*, II, no. 3, pp. 2–5. The letter from the pope is translated in *NoMiddaldok*, no. 13, pp. 70–71.

¹⁶ *DN*, I, no. 1, p. 1. *RegNorv*, I, no. 235 and no. 236, p. 98.

¹⁷ This term is discussed thoroughly by Erik Gunnes, 'Kirkelig jurisdiksjon i Norge 1153–1277' *Historisk Tidsskrift* [Norway] 49 (1970), pp. 137–148.

¹⁸ The surviving medieval cases of breach of *Christian laws* show that sexual crimes were in the majority. Details in Riisøy, *Stat og kirke*, pp. 178–195.

¹⁹ Riisøy, *Stat og kirke*, pp. 169–177.

²⁰ Helle, *Norge blir en stat: 1130–1319*, pp. 86, 186–187, Helle, *Gulatinget*, pp. 95, 99–101; Sunde, *Speculum legale*, p. 66.

²¹ Helle, *Norge blir en stat: 1130–1319*, p. 86; *RegNorv*, I, no. 197 [1189], pp. 85–86

We have noted how criminalisation of sexual acts manifested itself by the introduction of completely new prohibitions to the existing laws. With the probable exception of the *Old Christian Law of the Frostathing*,²² adultery and fornication were still not penalised in the Christian laws at the end of the twelfth century. These two categories constitute the last elements in the development towards the criminalisation of a whole spectrum of sexual acts. As seen, adultery and fornication were criminalised throughout the kingdom by the younger Christian laws of the mid-thirteenth century and in 1274 the *Landslaw* abolished the right to kill for revenge in such cases. Changes to rules for resolving conflicts in cases of murder follow the same pattern.

Honour was a central concept regarding the control of (women's) sexuality and murder. The Norwegian Crown and Church gained formal pre-eminence as supervising instances over all types of sexual relations. In combination with their control over murder cases this development was a milestone in the establishment of public authority in the Middle Ages.²³ All this was merely continued by the new state after the Reformation. Nor did the Reformation lead to a break in the field of legal practice. The whole spectrum of sexual crimes had been penalised before. Concerning the civil law aspects of illegal sexuality, the family continued to play an important role.

Public authorities had an interest in involving the parties concerned as well as the local community in the conflict-solving process.²⁴ The *Landslaw* shows that, in essence, the Crown shouldered the double responsibility of helping the parties reach a compromise and of helping the victim obtain compensation. In cases of sexual crimes this involved the local community to a large degree.²⁵ The state was interested in limiting self-help, advancing peace, and ensuring the punishment of criminal acts, both during the Middle Ages and in (Early) Modern Times.

refers to a now lost provincial statute which excommunicates rapists. The decree on the King's Peace, probably in the form of a *skipan* (order), was probably issued in connection with this provincial council.

²² Gunnes, *Erkebiskop Øystein*, p. 160.

²³ As Barbara A. Hanawalt and David Wallace formulate in 'Introduction', *Medieval Crime*, p. x: "The replacement of the family by the state as agent of justice in matters of honor forms a landmark in the evolution of state power."

²⁴ As documented on several occasions in the study by Steinar Imsen, *Norsk bondekommunalisme: Fra Magnus Lagabøte til Kristian Kvart* (Trondheim: Tapir, 1990).

²⁵ Riisøy, *Stat og kirke*, pp. 46–140, where I have discussed this aspect with regard to both sexual crimes and other breaches of the Christian laws.

PART B

PUNISHMENT

Supposedly, the punishment for sexual crimes increased significantly after the Reformation. Regarding capital punishment, it has normally been maintained that it had been generally rare during medieval times, and as far as sexual crimes are concerned the law did not authorise capital punishment at all.¹ This is in contrast with the post-Reformation period, when capital punishment was introduced for adultery, incest, repeated offences against so-called respectable women, rape, as well as bestiality and homosexuality. The assertion that there was a general increase in the severity of punishment after the Reformation therefore corresponds to the theory that the most common sexual crimes—adultery and fornication—were then also criminalised and indeed severely punished for the first time.²

The post-Reformation increase in the severity of punishment allegedly accelerated after 1600, a development which is linked to the growing acceptance of Mosaic Law and a more literal interpretation of the Bible. A criminal act also defined as sinful demanded a sharper sentence. The Crown's fight against sin and crime were thus seen as two sides of the same coin. Moreover, punishment can also be seen as a ritual or magical cleansing. This is particularly obvious in cases where the criminal was sentenced not only to death but also to be burned. An interesting

¹ Næss, 'Forbrytelse og straff', pp. 38–39 claims that capital punishment was only warranted for so-called religiously conditioned crimes in cases of harmful witchcraft (the use of supernatural powers which caused people's death); see also Næss, 'Trolldomsprosessene', pp. 48–53. Terjesen, *Blodskam og leiermål*, pp. 37–39 expresses the same view in her specialised study concerning incest. See also Viskum, 'Fortielse og straff', pp. 16–17; Bastiansen, 'Væ dig Bergen', pp. 27–28; Næss and Österberg, 'Sanctions', pp. 141–142, 150, 184; Sunde, *Speculum legale*, pp. 183, 250; Jonas Liliequist, 'Brott, synd och straff: Tidelagsbrottet i Sverige under 1600-och 1700-talet' (unpublished doctorate dissertation, University of Umeå, 1992), p. 89, points out that in Sweden the death penalty for bestiality was introduced in 1442, but otherwise the beginning of the seventeenth century was the formative era in this respect; *KL*, II, pp. 495–496; *KL*, III, pp. 455–459.

² Telste, *Mellom liv og lov*, pp. 59–69; Aarset, *Rettslig regulering*, p. 22; Bastiansen, 'Væ dig Bergen', p. 28.

distinction was made between crimes warranting “mere” capital punishment and those carrying the important additional sentence that the criminal’s body was to be destroyed. The aim was to re-establish the balance within society while at the same time warding off God’s wrath. This supposedly was the reason why harsher punishments were introduced after the Reformation, when the principle of equity (*aequitas*), allowing room for appreciation and understanding, gave way to the principle of equivalence which led to a more objective but also restrictive evaluation of the legal situation.

In chapter 4 we will see that capital punishment for serious sexual crimes was already introduced during the high Middle Ages. Also the view of punishment as a means to cleanse society and thus to ward off God’s wrath can be traced back to the pre-Reformation period. Chapter 5 then discusses fines for sexual crimes. Here, the continuity between the medieval and the Early Modern periods can also be seen by the fact that fines had to be paid for the same types of crimes, both before and after the Reformation. Finally, in chapter 6 we look at how the Church through penance and church discipline dealt with those who had committed a sexual crime.

CHAPTER FOUR

CAPITAL PUNISHMENT

Medieval or Modern?

First we shall look in more detail at capital punishment for different categories of sexual crimes after the Reformation and compare this to the legal situation during the Middle Ages.

With the *Odenseske Reces* of 1539, capital punishment was also adopted in Norway for cases involving the third instance of adultery—to be precise, execution for men and drowning for women. This provision was later repeated in the *Koldingske Reces* of 1558 and the *Norwegian Law* of 1687.¹ The first instance of adultery was punishable by loss of property, the second by loss of property in addition to banishment. To a certain degree these provisions were also implemented in Norway. This can for example be seen in the records of Nils Stub, from Oslo in the 1570s. The records refer to the provision demanding capital punishment for adultery in the third instance; a judgement of the *Herredag* in Oslo in the summer of 1585 provides similar information. The *Herredag* quotes explicitly King Christian as legal authority for capital punishment.² However, King Christian's provision of capital punishment cannot exclusively be ascribed to the Reformation. Poul Johannes Jørgensen comments that the provision is just as much a continuation of the status before the Reformation. He points to a Danish townlaw of 1443 which stipulates that men who had committed the crime of whoring for the third time were to be beheaded, while women were to be buried alive.³

¹ Odenseske recess, *Danske Kirkelove*, vol. 1, p. 135; Koldingske reces, *Forordninger, Recesser og andre kongelige Breve*, vol. 1, pp. 40–41; *Kong Christian den Femtes Norske Lov: 15de april 1687*, 6–13–25 (punishments are the same as in the recess of 1539, i.e. execution in the third instance) and 6–13–26 (two parties, each of them married, and who had the right to a warning before risking the death penalty), pp. 256–257.

² Nils Stubs, p. 55; *Norske Herredags-Dombøge*, III, p. 65. The decision of the *lawting* also indicates whipping and banishment after adultery in the second instance, also according to the *Odenseske Reces*. Nils Stubs, pp. 87, 194–195.

³ Jørgensen, *Dansk Strafferet*, pp. 377–378, with reference to *Stadsret* 1443 V-31. After the Reformation the punishment for the man was the same, but following the example

To what extent this rule was followed in medieval Denmark we do not know; hitherto no study on legal practice has been undertaken.

Although late medieval Danish law authorised the loss of property, banishment and capital punishment, Christian III's criminal laws introduced something new to Norwegian law in as far as neither the Christian laws, the *Landslaw* nor governmental edicts had prescribed capital punishment for adultery. Originally, precise fines had been incurred, according to the *Young Christian Law of the Borgarthing* three and six marks respectively for simple and double adultery.⁴ However, also in medieval Norway a more recalcitrant offender could face harsher penalties. An undated decree which King Håkon Håkonsson issued for Viken (Southern Norway) stipulates that people guilty of adultery, murder or perjury and who were utterly obstinate and no-one would want to vouch for, should be made outlaws at the assemblies. Afterwards, the king was to confiscate their property, movable and immovable, and banish them from the kingdom.⁵ In 1267 Magnus the Law-mender enforced this decree throughout the whole kingdom.⁶ Therefore even in Norway during the medieval period, outlawry, normally the law's most severe punishment, was already envisaged for adultery.

The most serious cases of adultery were those in which the unfaithful partner left his or her spouse. On this point, medieval and post-Reformation laws are in agreement. Contrary to adultery (*hór*), where obstinacy and repetition might only lead to outlawry and the confiscation of property, adultery in the form of elopement with another man's wife belonged to that most serious group of crimes which could not be compensated by with merely a fine. Such an adulterer was decreed an outlaw throughout the country; his movable and immovable property was forfeited to the king; and each and every man was allowed to kill him. The *Landslaw*, the *Norwegian Law* of 1604, and the younger Christian laws say quite clearly that the fugitives could be "slain and killed".⁷

of German/Roman law burying women alive was replaced by drowning. See also *KL*, XX, p. 502, 'Ægteskabsbrud, Danmark', p. 502.

⁴ NB II § 22, (*NgL*, IV, pp. 173–174); NB § 18, (*NgL*, II, p. 301); NG § 26, (*NgL*, II, p. 320); J § 44, (*NgL*, II, p. 371).

⁵ *NgL*, I, p. 459.

⁶ *NgL*, II, p. 454.

⁷ L IV 3, (*NgL*, II, p. 51): *dræpir oc dauða*; *Kong Christian den Fjerdes norske Lovbog af 1604*, III 2, p. 42, *dræbende oc døden* Cf the Christian laws; for instance NB I § 20,

Consequently, adulterers risked severe punishments also in the Middle Ages. However, capital punishment was not in fact carried out in any of the 38 documented cases. From the post-Reformation sixteenth century, 180 cases of adultery are documented and in a handful of these cases we have evidence of capital punishment from various parts of the country. Nils Stub's records from the Oslo lawthing from the 1570s show that two men, Per and Pål, were sentenced to death for adultery in the third instance.⁸ In which way the sentence was to be carried out is not documented. It is not impossible that the two men were beheaded, as another almost contemporary case also from the Oslo lawthing shows that beheading was the punishment for the third instance of adultery; Bjørn Førlun was found guilty of adultery in the second instance, and he was to "lose his head" (*møste syn hals*) if the crime should be repeated the third time.⁹ The threat of capital punishment if adultery is repeated is also documented in two other examples.¹⁰ If the guilty offender did not meet specific requirements when the judgement was given, for example to leave the country or not to repeat the crime, the sentence would be carried out. Nils Stub's records from the Oslo lawthing

(NgL, II, p. 302): *Drepir oc døyddir*; cf NG § 29, (NgL, II, p. 322); NB II § 24, (NgL, IV, p. 174). The decree of 1478, NgL, 2rk, II, p. 271 stipulates outlawry. According to *Kong Christian den Femtes Norske Lov: 15de april 1687*, 6–13–22, p. 256, they were to "forfeit life" (*miste Livet*), also the married woman when she had eloped voluntarily.

⁸ Nils Stub, pp. 55, 206. Pål had also tampered with a seal (*Signette*) which he used in his correspondence. In addition, we have information about the death penalty from other parts of the country. In a short note in Absalon Pederssøn's diary for the year 1564 we read that Hans Piper, Archbishop Olaf's last musician, was hanged in Trondheim. Hans had frequently been whoring during his wife's lifetime. He also had not behaved appropriate towards the king which may have played a role as well. *Absalon Pederssøns dagbog*, p. 81. Another man was jailed for adultery and is "sitting on his neck" (*sider paa sin hals*), a formulation which may indicate that he was on death row. The case is described in *Absalon Pederssøns dagbog*, p. 232. From a case brought before the *Herredag* in 1585 we gather that a man had been executed because of adultery in the third instance. The *Herredag* concluded that this had been judicial murder, and the deceased was acquitted *post mortem*, *Norske Herredags-Dombøge*, III, pp. 63–67. In the protocols of Stavanger Cathedral Chapter, *Stavanger domkapitels protocol*, pp. 51–54, we are informed about a Peder, arrested for adultery in the third instance, and sentenced to death (*lifs straff*). But Peder had escaped from prison, so we do not know whether the sentence was ever carried out.

⁹ Nils Stub, pp. 194–195. According to Poul Meyer, *KL*, III, 'Dødsstraf', pp. 455–459, the expression "forgiorth sin hals" alludes to hanging, but later the meaning changed to denote beheading in Denmark, while in Sweden it always meant beheading.

¹⁰ Nils Stub, pp. 87, 156. Sigurd and Kristoffer were to lose their lives if they did not go into exile.

in the 1570s also show that adulterers who ran away risked the death penalty or outlawry.¹¹

However, during the period 1300–1600, the vast majority of cases of adultery were punished by fines and/or confiscation of property. It is this pattern of punishment for adultery which we also find well into the seventeenth century, both in Norway and in Scandinavia at large.¹²

After the Reformation the definition of incest was narrowed down from the fourth to the third degree of kinship. The exact sentences that were passed, whether they were fines, confiscation of property, or physical punishment, are however not stated. It is first the decree on marriage of 1589 that allows us to deduce that capital punishment was a legal possibility. The ordinance decrees that if a person began relations with the brother or sister of his or her spouse, or with other unspecified close relatives, and if he or she escaped the death penalty, the offended partner could demand a divorce. The very formulation “escape the death penalty” shows that death penalties were meted out, although it was also possible to avoid it.¹³

Indeed, “close relative” is an imprecise term which allowed for different interpretations. In 1592, the government wrote a letter to the lord of Akershus, Axel Gyldenstjerne, concerning several serious cases of incest in his fief. The letter reports a young man who had had intercourse with his brother’s widow and was therefore according to the law guilty of incest with a relative of the first degree. The offender was to be sentenced to death without any possibility of mercy (*uden al Naade*). The letter also shows that capital punishment was not excluded in cases of incest with relatives of the second or third degree (nieces/nephews or second cousins).¹⁴

¹¹ *Nils Stubs*, pp. 158–159, 206. In 1577 a couple who left their spouses were declared outlaws according to the *Landslaw*. A man who in 1579 was sentenced to death because of leaving his spouse suffered the same punishment.

¹² Næss and Österberg, ‘Sanctions’, p. 153. Næss, ‘Forbrytelse og straff’, p. 36 only knows of one death sentence for adultery, but of many more for incest and recidivism (*løselevnet*). Telste, *Mellom liv og lov*, p. 151 (with reference to an unpublished manuscript by Jan Sundin) shows that when adultery became punishable by death in Sweden in 1614–1622, such cases vanished from the court protocols, in contrast to the periods before and after. Capital punishment in such cases was apparently too drastic a sanction.

¹³ *Lover og forordninger 1537–1605*, p. 221. See also Jørgensen, *Dansk Strafferet*, pp. 380–381.

¹⁴ *K. majs tilforordnede Regjerings-Raads brev* is discussed by Terjesen, *Blodskam og leiermål*, p. 102, and published in *Norske Rigs-Registranter*, III, pp. 232–233. Axel

[...] de andre, som ellers have beligget deres nære Slægt udi andet og tredie Led og skulle gjøres Forbøn for af mange at maatte benaades paa Livet, da efterdi det ikke er imod Guds Lov, meden imod de Forordninger, som derom her udi Rigerne ere udgangen, kunne vi ikke andet befinde, end de jo første Gang hver efter sin Evne og Formue mue straffes paa Godset, dog dennem derhos alvorligen forholdes, at, dersom slig mer befindes af dennem at begaaes, de da skulle straffes paa Livet uden al Naade,...

[...] others, who have slept with a close relative of the second and third degree and where many others have interceded and appealed for a reprieve, not because it is against the law of God, but against the decrees which have been issued in these Realms, we could not say otherwise, they will be punished the first time by loss of property, according to their capacity and wealth. However, they will be told, that if they commit this again, they will be punished without mercy with their lives,...

Just as with adultery, we see that also for incest in the second and third degree the death penalty was first and foremost intended for persistent offenders, the recidivists. Terjesen has put together an overview of the legislation about incest from the seventeenth century. A decree from 1610 indirectly established that relations between cousins were punishable by death and a decree from 1619 explicitly enacted this rule.¹⁵ The debate surrounding the possibility of the death penalty for incest with relatives of the second degree had obviously not yet ended. We have a letter written by the bishop of Oslo and Hamar, answering a royal letter from 15 January 1631 in which the Norwegian bishops are asked to expound upon ecclesiastical rules and customs. In this letter, the bishop of Oslo and Hamar argues that the death penalty should be abolished for incest with relatives of the second degree, since such a law was not founded on God's word. Consequently, the death penalty was abolished for these cases in a royal decree from 1637.¹⁶

Terjesen lists 13 nieces and nephews sentenced to death in the period 1610–1637 but no such cases after 1637, while Næss notes a clear decrease after 1640.¹⁷ This shows that legal practice in cases of

Gyldenstjerne of Lyngbygård was made vice-regent of Norway in 1588 and enfeoffed with Akershus in the same year.

¹⁵ Especially Terjesen, *Blodskam og leiermål*, pp. 93–97.

¹⁶ Terjesen, *Blodskam og leiermål*, pp. 97–99. Death penalty for incest with relatives of the second degree is not prescribed for first time offenders in *Kong Christian den Femtes Norske Lov: 15de april 1687*, 6–13–13, p. 255. However, if they recede, they ought to be punished by death.

¹⁷ Terjesen, *Blodskam og leiermål*, pp. 113–114, 116; Næss, 'Forbrytelse og straff', p. 36.

incest became in fact less severe towards the end of Christian IV's reign, ironically due to an interpretation of the Bible. It has been maintained that the Bible, and especially Mosaic Law, supported the passing of heavier sentences after the Reformation. How does the situation after the Reformation compare with the Middle Ages?

Terjesen contrasts between the death penalty or banishment in the seventeenth century and the acts of penance and fines to the bishop in medieval times.¹⁸ Terjesen bases her view that incest was a less serious crime in the Middle Ages on Knut Robberstad, who in turn refers to *Archbishop Jon's Christian Law* § 47 "On incest" (*Um frenzsemes spæll*).¹⁹ This indeed prescribes fines to the bishop; the amount varies according to the degree of kinship. In addition, the guilty person was to confess and to do penance. There is no doubt that both penance and fines were important in the medieval period, as both Terjesen and Robberstad claim. However, *Archbishop Jon's Christian Law* § 49, is not referred to by Robberstad in his overview and is entitled "Concerning those women for whom a man becomes an outlaw" (*Um þær konor er maðr værðr vtlægr firir*).²⁰ This paragraph explicitly concerns incestuous relations which entailed outlawry. The contradiction between these two paragraphs dealing with incest in *Archbishop Jon's Christian Law* is, according to Handeland, probably the result of a misunderstanding or a copy error.²¹

The younger Christian laws consistently prescribe outlawry as a punishment for incest between relatives of the first degree.²² As the older Christian laws show, this had been the law of the land also before the mid-thirteenth century.²³ A decree of 1478 tightened the rules by also including incest between relatives of the second degree, for example relations between cousins were punishable by outlawry.²⁴

We have evidence of 19 cases of incest from the medieval period. The material is however very fragmented and for the most part we do not know how the cases were concluded. One letter of *landsvist* (meaning

¹⁸ Terjesen, *Blodskam og leiermål*, pp. 37–38.

¹⁹ Robberstad, *Frå gamal og ny rett*, pp. 36–37, with reference to *NgL*, II, p. 372.

²⁰ *NgL*, II, pp. 374–375.

²¹ Handeland, 'I lyst og last', pp. 39–40.

²² NB§ 21, (*NgL*, II, p. 302); NG § 30 (*NgL*, II, p. 322); J § 47 (*NgL*, II, p. 372); NB II § 25 (*NgL*, IV, p. 175).

²³ For example G § 24, (*NgL*, I, pp. 15–16), *The Earliest Norwegian Laws*, pp. 53–54.

²⁴ *NgL*, 2rk, II, p. 270.

the outlaw could buy his life and legal rights back from the king) is extant, as is the evidence concerning the famous case against the nobleman Nils Lykke. I will return to these two cases later in this chapter. We also have evidence of 43 cases of incest from the post-Reformation sixteenth century, where the degree of kinship is not always mentioned. Of those cases where this information is provided, 17 of them deal with incest between relatives of the first degree. Three of these led to capital punishment for the offender. One was burnt on the stake, one was beheaded, and the details of the exact mode of execution for the third case are not known.²⁵ This last case was decided by the lawthing in Oslo in 1576; it concerned a man who had had a relationship with the sister of his wife. The woman conceived, and it is reported that they were “both sentenced to lose their lives” (*thii bode sagdt fra theris liiff*) based on the fact that they were not protected by any law.²⁶ The Oslo lawthing passed sentence in another 5 cases of incest in the first half of the 1570s. One of these led to outlawry, while the others were characterised as heresy. These cases may have entailed the death penalty without any special written note being made; the relevant entries in the court protocols amount to no more than one or two short lines for each case. Considering the above-mentioned letter to the lord of Akershus (1592) it is possible that the death penalty was also pronounced in cases of incest between relatives of the second or third degree, although there is no positive evidence for this in the surviving records.²⁷

However, the death penalty was not consistently applied even in cases of incest between relatives of the first degree. A certain Mikkel for example, who had had intercourse with two sisters, escaped capital punishment in return for a payment of 29.5 riksdalers and 1 measure of silver in 1560.²⁸ Why some incestuous offenders which according to law ought to be punished with a death sentence escaped with their lives will be discussed in detail below and in part C.

Rapists risked severe punishments both before and after the Reformation. According to the *Landslaw*, IV 4, a provision which was

²⁵ NLR, V, p. 8 (stepmother and stepson burned in 1557); *Norske Herredags-Dombøge*, pp. 152–153 (in Trondheim in 1597 a man who had had sex with both mother and daughter was beheaded); *Nils Stubs*, p. 137.

²⁶ *Nils Stubs*, p. 137.

²⁷ Regarding Denmark, KL VII, p. 379, describes a case of incest where a person who had sexual relations with a niece/nephew was burnt on the stake in 1507.

²⁸ NLR, VI, p. 171: “løsthe han ßin liiff yghenn” [redeemed his life], fief of Fosen in the year 1560.

taken up by the *Norwegian Law* of 1604, rape was to be punished by outlawry. The severity of the sentence was dependent on whether the rape had been fully carried out or not. In the latter case the culprit was to remain alive (*hallde þo lifuinu*, 1274 / *beholde liffruit*, 1604); a formulation which seems to indicate that he risked the death penalty in the former case, provided the evidence had been convincingly presented.²⁹ If in addition the crime had been witnessed by others, the rape was characterised as a *halszløs gierning*, in 1604. The *Norwegian Law* of 1687 prescribes that the culprit was to lose his life regardless of whether or not the rape had been fully carried out. This is a more severe sentence when compared to the older laws.³⁰ The decree on marriage of 1582, in force in Norway since 1589, decrees that a second offender was to suffer the death penalty (*straffis paa lifvit*) according to “the laws of God and Nature” (*eppter guds och naturlig loug*). However, the man could save his life by marrying the victim or by paying compensation to her for her lost honour.³¹ This provision may have been inspired by high medieval canon law. In 1200 Pope Innocent III permitted marriage after rape, provided the victim consented. Kathryn Gravdal’s view on the medieval debate surrounding rape is that it resulted in a serious step backwards “[...] to the influence of Germanic law: they ruled that the ravisher, by way of penance for his crime, could simply marry his victim, if she consented.”³²

Of the 3 cases of rape in the Middle Ages we only have information about the outcome in one case, which ended with the payment of a fine.³³ We know the conclusion of 6 of the 10 cases of rape in post-Reformation sixteenth century. Apparently, the death penalty was a possibility. The

²⁹ L IV 4, (NGL, II, p. 52), *Magnus Lagabøters landslov*, p. 47; *Kong Christian den Fjerdens norske Lovbog af 1604*, III 2, p. 43. The execution was probably carried out by the king’s steward or someone else they had offended against, which in practice meant the woman’s male relatives.

³⁰ *Kong Christian den Femtes Norske Lov: 15de april 1687*, 6–13–18, p. 256 which has the formulation: “Hvo som nogen Qvindfolk vil med Vold tage, og hendis Raab og Skrig om hielp hørís, og synís blaát Kiød, eller revne Klæder, hand miste sit Liv, enndog hand sin Villie ikke fuldkom”. [Whoever wants to take a woman with violence and her shouting and cries for help is heard, and if her skin is blue, or clothes torn, he shall loose his live, even if he did not succeed.]

³¹ *Lover og forordninger 1537–1605*, p. 220, point 10.

³² Kathryn Gravdal, *Ravishing Maidens: Writing Rape in Medieval French Literature and Law* (Philadelphia: University of Pennsylvania Press, 1991), p. 9.

³³ DN, XIII, 163, p. 140, [1499], here the rapist had to pay a substantial fine, 30 marks of silver. DN, V, 992, p. 714, [1502] has a formulation that they were judged with “liff oc gotz” i.e. [life and property].

protocol of the Oslo lawthing from 1572 shows that two men were to lose their lives (*miste sit líff*) because they had raped a woman, but how the sentence was carried out is not documented.³⁴ Three years later two other men were declared outlaws according to the *Landslaw*, *Book of Personal Rights*, § 4, a sentence which might have included the death penalty.³⁵ Also based on the *Book of Personal Rights* §§ 4 and 5, the lawthing in Bergen pronounced a conditional death penalty for a man in the beginning of the 1590s.³⁶ Apparently, the king's men were able to influence the important final decision whether the culprit was to keep his life or not. In 1575 Governor Poul Huitfeldt issued a letter of safe-conduct for Peder Kock from Gudbrandsdalen, a valley in southern Norway, who was accused of rape. This ensured not only Peder's freedom during the journey to the hearing. It also pre-determined whether an eventual sentence would be carried out or not; if Peder was found guilty, to please God and His Majesty the King the governor would spare his life.³⁷ On the other hand this formulation also seems to indicate that the death penalty was generally not uncommon in such cases.

The legal discussions surrounding the few medieval Norwegian court cases concerning rape are very limited, and the existing laws are only briefly referred to. For our purposes it is therefore natural to include a case of aggravated rape from Iceland in this analysis. The case is dated 1504 and bears witness to the importance of orderly and correct procedures. *Jónsbók* was the legal basis for the case. The Icelandic law-book *Jónsbók* is named after the lawman Jón Einarsson, one of the leading compilers. It was sent from Norway to Iceland in 1280, to be accepted at the Allthing. It is mainly inspired by the *Landslaw*, with 196 of 251 chapters taken from there.³⁸ The question to be decided was how to punish the rapist. Following the lawman's pronouncement, the culprit was to have all the fingers on his left hand cut off from the palm by means of either a knife or an axe: "missa med hoggi hvífi edr avxi alla fingyrna aa enne vinstri henndinne j efzstu lidunum vid handarbakid".³⁹

³⁴ *Nils Stubs*, p. 11.

³⁵ *Nils Stubs*, p. 100, concerning Tor Andersen and Nils Sørensen who had raped the same woman.

³⁶ BRST, fol. 68b.

³⁷ Unpublished diploma, Riksarkivet, 28 June 1575.

³⁸ *KL*, VII, pp. 612–613. See also Gudmund Sandvik and Jón Viðar Sigurðsson, 'Laws' in *A Companion to Old Norse-Icelandic Literature and Culture*, ed. by Rory McTurk (Malden, Oxford, Victoria, 2005), pp. 227–228.

³⁹ *NgL*, 2 rk, III 1, p. 261.

The lawman then commented rather dryly that it would then be up to the offender himself whether or not he survived. The evidence shows clearly that the culprit only avoided the death penalty in this case because the formalities had not been fully adhered to; the woman concerned had been unable to comply with the legal requirement to announce the rape to people who were respectable and fully of age within twenty-four hours. If this legal condition had been met, the culprit would have been executed immediately: “If the witnesses and the announcement had been legal, according to the law-book, then Svein would immediately have lost his life” (*Enn hefði vitnen oc lysingen verid loglig eptir logbokenni þa hefði greindr Sveinn mist lifit þar strax*).⁴⁰

Rape in Early Modern Norway is discussed by Telste.⁴¹ Telste argues that it was exceedingly difficult to get the court to pass sentence. Out of 9 possible cases of rape, 2 did not lead to a formal charge, and only one was concluded; this culprit, in 1669, was outlawed.⁴² Telste further lists several men who were punished for fornication because it was problematic to prove rape. Quite likely it is precisely this lack of evidence which explains the small number of sentences in Telste’s material. Telste has also found evidence that most women were silent if the rape had no further consequences.⁴³ If women did not denounce the rape until they were visibly pregnant, the law’s formal requirements demanding the presence of bruises, torn clothes, and especially of an immediate announcement of what had happened would not be met.⁴⁴ The cases of rape that I examined from the second half of the sixteenth century show clearly that the courts did not have any qualms passing a death sentence or another harsh judgement. Precisely because rape could entail capital punishment the question of whether or not the evidence was

⁴⁰ Blom, ‘Loven og livet’, pp. 562–563. For the published document *NgL*, 2 rk, III 1, pp. 261–262. *Jónsbók: Lögbók Íslendinga hver samþykkt var á alþingi árið 1281 og endurnýjuð um miðja 14. öld en fyrst prentuð árið 1578*, *Sýnisbók Íslenskrar alþýðumenningar*, 8. ed. by Már Jónsson (Reykjavík: Háskólaútgáfan, 2004), p. 103, is based on Landslaw’s L IV 4, (*NgL*, II, p. 52) *Magnus Lagabøters landslov*, p. 47.

⁴¹ Neither Terjesen nor Bastiansen discuss rape.

⁴² Telste, *Mellom liv og lov*, pp. 190–193.

⁴³ Telste, *Mellom liv og lov*, p. 193.

⁴⁴ Handeland, ‘I lyst og last’, pp. 93–104 for a discussion of medieval legislation. *Kong Christian den Fjerdes norske Lovbog af 1604*, III 2, p. 43 underline that the woman needs to announce the rape on the day it happened. *Kong Christian den Femtes Norske Lov: 15de april 1687*, 6–13–18, p. 256, stresses the necessity of clear signs of mistreatment; physical wounds and torn clothes. The following paragraph says expressly that if the woman remains silent about the rape until she is visibly pregnant “then it is likely that she was not raped” (*da er det troeligt, at hun ej var voldtagen*).

conclusive was of such importance. This focus upon correct procedure is also reflected in legislation, both before and after the Reformation.

Regarding bestiality and homosexuality, the *Norwegian Law* of 1687 prescribes that such unnatural acts warranted burning at the stake. The younger Christian laws and the decree of 1478 stipulate outlawry for these acts.⁴⁵ As already mentioned, there is extant evidence for two medieval cases, one of bestiality and one of homosexuality. While the homosexual couple may have got away with having their property confiscated, the sodomite ended at the stake. This latter case shall be discussed in more detail in the following chapter. We know of only one such case from post-Reformation sixteenth century. According to a notice in Absalom Pederssøn's diary from the year 1564 a peasant originally from Ryfylke was beheaded at Nordnes (the traditional place for execution also in the Middle Ages) for *sodomiam et bestialitatem*. The arrested peasant had first been transferred to Bergenshus, but he had managed to escape and had lived in the woods for several years.⁴⁶

This overview shows that there exists a long history of continuity where serious sexual crimes entailed the death penalty. Before 1600 however, capital punishment was explicitly warranted only for adultery in the third instance and for relations with several respectable women. During the period 1610–1637 it was extended to include incest with relatives of the first and the second degree and from 1687 to include homosexuality and bestiality. The provisions of the *Landslaw* concerning adulterers who “ran away” and rapists were addressed by the *Norwegian Law* of 1604, and as discussed above, the death penalty was a possibility in these cases. It is explicitly stated that anyone, King or men, had the right to kill the culprit. Consequently, for several main categories of sexual crimes it is necessary to examine more closely the legal basis of those cases which ended with the death penalty before 1600. In this respect the question of what exactly outlawry entailed is particularly important.

Outlawry, that is, to be “placed outside the law”, implied the loss of legal protection.⁴⁷ This had several consequences. For instance the outlaw

⁴⁵ NB § 24 (*NgL*, II, p. 304); NG § 33 (*NgL*, II, p. 324); NB II § 29 (*NgL*, IV, p. 176). *NgL*, 2rk, II, p. 270.

⁴⁶ *Absalon Pederssøns dagbog*, pp. 52–53.

⁴⁷ According to Ebbe Hertzberg who was responsible for the glossary of *NgL*, V, p. 676, *útlagr*, *útlægr*, *útslægr* means “fredløs, stillet udenfor loven” i.e. “outlaw, placed outside the law”. Thus Hertzberg disagrees with Vilhjálmur Finsen, who in the glossary of *Grágás* was of the opinion that the terms *útlagr* and *útleð* allude to *leggia*, *leggia*,

was expelled from the country, he risked forfeiture of his property and anyone could kill him without having to answer for it. What outlawry entailed was not static, there were changes over time. The introduction of Christianity in particular gradually exercised influence over the concept and applicability of outlawry. For instance penance became one factor in which a sentence of outlawry might be mitigated or abolished, and the outlaw was at times denied a Christian burial.⁴⁸

Outlawry originated in a society which did not yet have any executive organs which could bring a criminal to justice, or carry out a court sentence. Already the earliest Christian legislation prescribes outlawry for serious sexual crimes, incest between relatives, and bestiality.⁴⁹ With the revision of the *Old Christian Law of the Gulathing* during Magnus Erlingsson's reign in 1163/64, the number of crimes punishable by outlawry increased. In several cases the *Olafstext* prescribes a fine of three marks, while the *Magnustext* prescribes outlawry and also because for example homosexuality was criminalised for the first time.⁵⁰ Thus, according to Helle, outlawry became the primary means within a drastic deterrent system which aimed at creating peace in society.⁵¹ As a last consequence, outlawry could entail capital punishment. However, the

i.e. 'lay out', not of *lög*. Most scholars agree with Hertzberg's interpretation, as do I. Anglo-Saxon sources offer additional support for this interpretation. A recent study by Sara M. Pons-Sanz, *Norse-Derived Vocabulary in Late Old English Texts: Wulfstan's Works, A Case Study* (Odense: University Press of Southern Denmark, 2007), presents a thorough discussion of these problems; see especially pp. 61–62, 80–83. The Anglo-Saxon legal term *utlah*, which is linguistically akin to *útlagr/útlegð* must have been connected with *lagu* at the time it was borrowed by the Anglo-Saxons. It is not likely that *utlah* was connected with *leggja* "laying out" because traces of such a connection have not been found in existing forms. Pons-Sanz argues that 'the connection which probably existed in the Anglo-Saxons' minds between *útlah/útlaga* "outlaw(ed)" (as well as *inlagian* "to reverse a sentence of outlawry") and *lagu* justifies the analysis of these terms as members of the *lagu* word-field.' Besides, the "OE *lagu* in its earliest records (none older than the tenth century) is solely associated with the Scandinavian newcomers and their legal practice."

⁴⁸ Anne Irene Riisøy, 'Outlawry and Ecclesiastical Power in Medieval Norway', in *Law and Power in the Middle Ages*, ed. by Per Andersen, Mia Münster-Swendsen and Helle Vogt (København: Djøf Publishing, 2008), *passim*.

⁴⁹ G §§ 24 and 30, (NgL, I, pp. 15–16, 30), *The Earliest Norwegian Laws*, pp. 53–54, 57–58.

⁵⁰ G § 33, (NgL, I, pp. 19–20), *The Earliest Norwegian Laws*, pp. 58–60.

⁵¹ Helle, *Gulathinget*, p. 100; Tore Iversen, *Trelldommen: Norsk slaveri i middelalderen* (Bergen: Historisk institutt, Universitetet i Bergen, 1997), p. 62.

king could show mercy and grant the criminal legal protection and the right to remain in the country *landsvist*. This *landsvist* appears for the first time in the Christian laws sections in the *Old Law of the Frostathing*.⁵² It is thus possible that the principle of *landsvist* was introduced in ecclesiastical law during Magnus Erlingsson's reign as part of Archbishop Eystein's revision, when new crimes were punished with outlawry. The *Old Law of the Frostathing*, Introduction § 5, probably from 1260, stipulates that an outlaw could be killed if he did not buy his peace; that is, legal protection from the king.⁵³

In fact, a systematic analysis of the legal situation shows that the crimes which warranted the death penalty after the Reformation had earlier been categorised as cases of outlawry. These concerned persistent adulterers and adulterers who "ran away", people who had committed incest with relatives of the first (from 1478 also of the second) degree, rapists, and men who had sexual relations with other men, or with animals. The decree of 1478 gives a short and precise overview of the whole spectre of sexual crimes that warranted outlawry.⁵⁴

There can be no doubt that medieval legislation on sexual crimes allowed for the death penalty, via the institutions of outlawry and the right to remain in the country (*landsvist*). We can probably interpret the announcement in the decree of 1478 that "they could beg their lives from the King" (*liffvet skulle thee tiigge aff konningen*) to imply that sexual acts that according to the law were punishable by outlawry entailed the death of the culprit unless the king showed mercy.

⁵² F III § 21, (NgL, I, p. 154), *The Earliest Norwegian Laws*, p. 254. A person who had been excommunicated had to settle the matter within three months, otherwise the bishop's steward shall summon him to the *thing* and make him an outlaw, and furthermore: "And let the bishop have all his chattels, but the king may sell him the right to remain in the land." F III § 24, (NgL, I, p. 156), *The Earliest Norwegian Laws*, p. 255 makes clear that if a person has been made an outlaw at the *thing* because of a breach of the Christian Laws, "a payment is due to the king for restoring his rights before he may return to peace and security". An older legal image is still extant in a few paragraphs in the *Book of Personal Rights* in the *Old Law of the Frostathing* and the *Old Law of the Gulathing*, which stipulate that the criminal could literally buy his release from the woods (*kaupa sik or skoge*). See references to *skógr* in NgL, V, p. 581, and also compare the term *skógarmaðr*, which designates the full outlaw in the Icelandic *Grágás*. In Icelandic law and sagas compounds with *skógar*- must be a loan from Norway, since even in earlier times the woods in Iceland were not dense enough for an outlaw to hide.

⁵³ NgL, I, p. 122, *The Earliest Norwegian Laws*, pp. 214–215.

⁵⁴ NgL, 2rk, II, p. 270.

The institution of *landsvist*, which was in principle applicable to all crimes which could not be compensated for by fines, is also mentioned in the *Landslaw*. Firm administrative routines for *landsvist* however only appeared under Håkon V's reign; the oldest extant letters of *landsvist* date to the beginning of the fourteenth century. It needs to be added that already at the beginning of the fourteenth century the letter of *landsvist* had a precise diplomatic and almost systematic form which on the whole remained unchanged as long as the institution existed.⁵⁵ For the remainder of the medieval period and up until the absolutism in 1660 it was the chancellor's main duty to administer this process and to issue letters of *landsvist*. Such a document concluded what we could call the criminal proceedings. Before the letter was issued, the affair was subject to a public investigation but first the case needed to be publicly announced according to the requirements of the law. During the period of public investigation the offender was temporarily under legal protection (*grið*) and the royal representative (*sýslumaðr*) or his aides, in cooperation with the local community where the crime had been committed, were in charge of gathering the evidence. Facts born out by witnesses, together with public opinion on the affair decided the outcome. If the crime could be compensated for by a fine—for example in cases where the act was not premeditated—and if the offender was able to pay the fines to the king and was willing to settle the matter with the victim's relatives and the Church, then *landsvist* was probably granted; the culprit retained the right to remain in the country. Extant evidence shows that letters of *landsvist* were read to the public in church.⁵⁶

In a case of incest in 1384 a letter of *landsvist* was issued and it shows interesting similarities with letters of *landsvist* issued in cases of manslaughter.⁵⁷ Trond Erlendsson claimed that when he had lain with his stepdaughter, it was not premeditated, *ufersyniu*. *Ufersyniu* is regularly claimed as a reason to recommend *landsvist* in the documents presenting the evidence and as a reason to grant it in the ensuing letters in nearly all extant manslaughter cases from the Middle Ages and the sixteenth century. This became established legal practice after 1300, well

⁵⁵ Steinar Imsen, 'Kunsten å konstruere. Noen kritiske merknader til Erling Sandmos avhandling "Slagsbrødre. En studie av vold i to norske regioner i tiden fram mot eneveldet"', *Historisk Tidsskrift* [Norway] 77 (1998), pp. 489–490.

⁵⁶ *KL*, XXI, pp. 259–264; *KL*, X, pp. 297–298.

⁵⁷ *DN*, XXI, no. 171, p. 133.

documented by evidence.⁵⁸ Trond had to pay 10 marks as redemption, a perfectly normal fine in cases of manslaughter, payable within twelve months. In addition, Trond had to submit to Church rulings on penance as well. The parallels to manslaughter cases are obvious. We also have good reason to assume that killers who could not claim *ufersyniu*, or who could not compensate for their crime with a payment, neither to the king nor to the victim's relatives, were put to death.

Moreover, it is not only the institution of *landsvist* which shows that the death penalty was a distinct possibility in cases of serious crimes during the Norwegian high and late Middle Ages. There are also several general provisions in the *Landslaw* which indicate that the death penalty was applied. For example, a priest was to be available for those people "condemned to lose life and limbs" (*til bana eða lim latz eru dæmdir*).⁵⁹ The *Landslaw* also stipulates that the royal representative was to hire executioners separately for each case.⁶⁰ As Grethe Authén Blom argues, this might indicate that executions were relatively rare during the second half of the thirteenth century.⁶¹ On the other hand, we know that professional executioners are a relatively modern phenomenon and that as late as the seventeenth century criminals were engaged to do the deed, frequently in return for having their own life spared. Being a hangman was in itself degrading.⁶² Furthermore, the *Landslaw* also orders that everyone at the assembly was to follow the criminal, who had been sentenced to death to the place of execution.⁶³ This also applied to members of the royal *hirð*, should one of their numbers be

⁵⁸ Imsen, 'Kunsten å konstruere', p. 492.

⁵⁹ L IV 18 (17), (NgL, II, p. 63), *Magnus Lagabøters landslov*, p. 60.

⁶⁰ L IV 9 (8), (NgL, II, p. 54), *Magnus Lagabøters landslov*, p. 49.

⁶¹ KL, II, pp. 495–496; a view supported by Kristoffer Mathias Vadum, *Dom og straff i Kongespeilet: En analyse av verkets rettslære i forhold til en norsk og europeisk bakgrunn* (Oslo: Senter for studier i vikingtid og nordisk middelalder Unipub, 2004), p. 75.

⁶² KL, II, p. 496. *Norsk historisk leksikon*, pp. 74–75 (article on executioners) notes that there is no extant evidence on medieval executioners, and that professional executioners appear only relatively late. According to the *Townlaw* of 1276, the lower town officials could in certain circumstances be ordered to carry out death sentences, but Imsen and Winge argue that it was probably normal for different people to act as executioners from case to case; paid for individually. An executioner was in charge of carrying out death sentences as well as other physical punishments such as branding and flogging.

⁶³ L IV 9 (8), (NgL, II, p. 54), *Magnus Lagabøters landslov*, p. 49. Cf. the section of theft, L IX 2, (NgL, II, p. 169), *Magnus Lagabøters landslov*, p. 184, cf., *Kong Christian den Fjerdes norske Lovbog af 1604*, VIII 2, pp. 186–187.

executed: “skulu logunautar fylgia til þauða”.⁶⁴ Members of the Hanseatic League managed to gain exemption from this duty in the great letter of privileges King Eirik Magnusson issued in Tønsberg in 1294.⁶⁵ Such a general duty, or an explicit exemption from it, is a strong indication that the death penalty was both pronounced and carried out. Lastly, some letters from the reign of Håkon V Magnusson bear witness to the fact that capital punishment with public executions and other corporal punishments took place around 1300. We shall return to this in the following sub-chapter, “Punish and Purge”.

In addition, we know of several places of execution located outside Norwegian towns during the Middle Ages.⁶⁶ Recent reports of archaeological excavations of a Christian cemetery in Skien, published by Gaute Reitan, support the view that a certain number of executions occurred before the period when more and more severe sentences were supposedly passed during the seventeenth century. The cemetery was in use from the late tenth century until approximately 1600. It went out of general use after the Plague in the mid-fourteenth century but there are indications that it was subsequently used to bury people whose death sentence had been carried out at the town’s place of execution (*Galgeholmen* i.e. *Gallows skerry*) which was a mere fifty metres away. Three skeletons of people who had been beheaded were excavated, most probably dating back to the Reformation period. In addition to the beheading, one of the skeletons showed signs of burning and the severed head had been placed between the legs. The placing of the head between the legs is probably a very ancient and derogatory custom, perhaps to prevent the deceased from returning from the dead.⁶⁷ The same chronological layer also yielded five other skulls, nicely arranged in a half-circle. As Reitan

⁶⁴ Hirdloven, pp. 154–155.

⁶⁵ I am grateful to Hanne Monclair for bringing the exemption for the Hanseatic League to my attention. *NoMiddaldok*, no. 41, p. 206, a translation which is based upon *DN*, V no. 23, p. 22.

⁶⁶ Grethe Authén Blom in *KL*, V, pp. 163–166 ‘Galge o. galgbacke’ names Holmen in Bergen, Ørene in Trondheim and Galgeberg in Oslo (in medieval times *Mortustokkar*, translating as “torture-stakes”). See also Kari Ellen Gade, ‘Hanging in Northern Law and Literature’, *Maal og Minne* (1985), *passim*.

for a discussion of place-names with the prefix “gallows” in Norway and Iceland.

⁶⁷ G 241, (*NgL*, I, pp. 80–81), *The Earliest Norwegian Laws*, p. 160: “When the wergild shall be increased” states that if the head is severed from the body, and the head is placed between the feet, the wergild shall be increased to the double.

explains, it is possible that these skulls, before their burial in the disused cemetery, had been displayed on posts as a warning to others.⁶⁸

Taken together the various sources indicate that the death penalty was in fact applied to certain sexual crimes already during the medieval period. As far as the question of royal mercy is concerned, the types of offence together with the attitude of the culprit, whether he consented to do penance and pay compensation to the victim (-)s, possibly the circumstances of the deed, and certainly whether he could pay a heavy fine, were decisive. As for the use of *landsvist*, a line was probably drawn between those who had and those who did not have enough money to pay for their crime.

The executioner's axe may have awaited the poor; in this respect it seems that far older principles were continued. The eleventh- and twelfth-century provincial laws are characterised by a legal philosophy in which humanity is socially, and therefore legally, stratified. In other words, several paragraphs are based on the concept that one type of law applied to free people and another to slaves and semi-free people. This found its expression in criminal law in several provisions both in the Christian- and secular laws; slaves and the semi-free persons were to be flogged when they were unable to pay their fines. From the second half of the thirteenth century on there were no longer any provisions distinguishing between freemen on the one hand and slaves and the semi-free on the other.⁶⁹ Nevertheless we do have indications that social divides continued, if perhaps more subtly. Especially the institution *landsvist* pre-supposes that a person guilty of a serious crime could avoid outlawry if he or she was able to reach a financial agreement with the Crown. In this respect economic power was the deciding element. As Lizzie Carlsson argues for Sweden, we can draw the distinction between fines and corporal punishment via the alliterative legal rule stating that someone who does not own a cow, will have to pay with his body (*den bättra med kropp, som ej äger ko*), a formulation found in both medieval

⁶⁸ Gaute Reitan, 'Fra kokegroper til halshugger på Faret' in "De gåtefulle kokegroper", *Varia, Kulturhistorisk Museum Fornminneseksjonen* 58 (2005), pp. 183–184. I am grateful to Unn Pedersen for directing my attention to the find and its publication, and to Gaute Reitan for a pleasant and informative talk.

⁶⁹ By contrast, the younger Christian laws, as well as the *Landslaw*, refer to people in a socially neutral way, usually as *maðr* (in the meaning person, not man). I have discussed this issue in more details in Anne Irene Riisøy, 'Kristenrettene og sosialhistorien' in *Den kirkehistoriske utfordring*, ed. by Steinar Imsen (Trondheim: Tapir, 2005), pp. 59–74.

Swedish laws and court protocols.⁷⁰ Such “Swedish” conditions probably were valid in Norway as well, also after slavery had been formally abolished, even if Norwegian legislation does not formulate this quite as precisely and explicitly.

Outlawry had the potential to amount to a death penalty, also in cases of serious sexual crimes. This becomes obvious when we consider the connection between outlawry and having one’s life spared via the institution *landsvist*. The legislative distinction between the death penalty and outlawry must have been very small. When medieval sexual laws explicitly stipulate the death penalty, it is for rapists and adulterers who ran away.⁷¹ There is no information available about how the sentences were carried out, but it is significant that in concrete cases known from other sources the culprit ended his life on the stake.

Punish and Purge

Death at the stake is seen as a typical example of the increase in the severity of penalties during the seventeenth century. The aim was not merely to take the culprit’s life, but also to destroy his body. At the same time, the punishment represented a religious reconciliation with God. God’s wrath was directed away from society and towards the sinner as he and his sins were exterminated.⁷² The principle of equivalence following in the wake of the Reformation and the increasingly literal interpretation of the Bible characterises this type of punishment. One of its main aims was to re-establish the balance within society by removing what was unclean.

The stake as a punishment for sexual crimes in Norwegian law appears for the first time in a decree in 1637. If a man had sexual relations with both mother and daughter he was to be burnt at the stake after his execution.⁷³ Since the burning of the culprits was to take place only *post mortem*, it stands to reason that this was motivated by the intention to destroy. Following the example of Mosaic Law *Leviticus* 20, the

⁷⁰ *KL*, IX, p. 446.

⁷¹ Cf the earlier analysis in this part. That the criminal had forfeited his life in cases of rape, abduction of women, or when he eloped with others’ wives is also noted in the *Landslaw*, L X 2–11, (*NgL*, II, p. 177), *Magnus Lagabøters landslov*, pp. 193–194.

⁷² Terjesen, *Blodskam og leiermål*, pp. 22–23; Næss and Österberg, ‘Sanctions’, pp. 151–152.

⁷³ Terjesen, *Blodskam og leiermål*, pp. 92–97.

principle of clean/unclean elements is applied. In addition, the *Norwegian Law* of 1687 prescribes the stake for severe cases of incest: “The bodies, when they are decapitated, shall be thrown into the fire to burn” (*Kroppene, naar de halshugne ere, kastis paa en Ild og opbrændis*); the following paragraph dealing with bestiality and homosexuality stipulates “Intercourse, which is against Nature, is punished with Fire and Burning” (*Omgængelse, som er imod Naturen, straffis med Baal og Brand*).⁷⁴

It seems that legal practice went before law; Terjesen gives an example of burning at the stake before 1637. The sentence in a case of incest dating from 1628 and which was noted in the account rolls of the fief, was death by beheading followed by burning at the stake.⁷⁵ Indeed, if we go back to include the post-Reformation sixteenth century we find a short notice in the account rolls for Akershus reporting that in 1557 both stepmother and stepson were burnt because they had had a relationship.⁷⁶

As mentioned, we also know of two cases of sexual crimes from the Middle Ages where the perpetrators ended at the stake. In 1530 the lawman in Stavanger Nils Clausson and twenty-one jurors in Ryfylke announced that the king’s steward in Fjordane and Karmsund had brought before court the prisoner Alf Botolvsson, charged with having had sexual relations with a cow: “om en koo at han skwlle brwghet syn legoms loste met”.⁷⁷ The exceptionally high number of jurors mentioned in this document indicates the severity of this crime. Initially, Alf denied having had sexual relations with a cow, whereupon the court ordered him to swear a purgatory oath (*undanførsle*) or to provide oath-helpers. However, Alf was unable to find anyone willing to stand surety for him.⁷⁸ On the contrary, four people came forward and gave witness against Alf, upon which Alf “acknowledged his deed and begged for mercy” (*bekendis selff syn gernyngh oc bad nadhe for segh*).⁷⁹ Yet, Alf’s plea for mercy was not answered here; he ended at the stake.

⁷⁴ *Kong Christian den Femtes Norske Lov: 15de april 1687*, 6–13–14 and 6–13–15, p. 255.

⁷⁵ Terjesen, *Blodskam og leiermål*, p. 135.

⁷⁶ *NLR*, I, p. 8.

⁷⁷ *DN*, XXII, no. 159, pp. 152–153.

⁷⁸ In medieval legal practice terms like oath-help, purgatory oath and (neighbourly) guarantor were synonymous, see Riisøy, *Stat og kirke*, pp. 47–53. The statement of the accused had to be verified, something which his or her neighbours usually did by standing surety for the accused, or alternatively, as here, by not doing so.

⁷⁹ *DN*, XXII, no. 159, pp. 152–153.

A few years later, Nils Lykke the son-in-law of Inger Ottesdatter of Austråt and brother-in-law of Vincens Lunge suffered the same fate.⁸⁰ The following summary of this well-known case of incest from the 1530s, involving some of the country's most important people, is based on Lars Hamre's detailed analysis.⁸¹ In 1532 Nils Lykke's wife died. Some time later he began a relationship with Lucie, the sister of his deceased wife. At that time, Archbishop Olaf was not only the highest ecclesiastical authority in the diocese and the speaker of the Council of the Realm. As feudal lord of the Trøndelag the Archbishop also represented the highest royal authority in this area: from 1475 until the Reformation the Archbishopric of Nidaros was enfeoffed with the Trøndelag.⁸² The archbishop of Nidaros had issued a letter of safe-conduct for Nils, the terms of which Nils later violated. Hamre assumes that the safe-conduct had been issued under the condition that Nils went to confession and that he would reach a settlement with Lucie's relatives. The fact that Nils did not meet any of these demands indicated that he was a remorseless sinner. Eventually, Nils was charged with heresy along with his sister-in-law by a court of twenty-four men in Trondheim. Reference was made to Norwegian and Christian law and to venerable old custom to justify death at the stake. The members of the Council of the Realm had believed that a suitable punishment for a "heretic" like him would be fire and tar.⁸³

After he had confessed to the crime, Nils Lykke stated that he would submit to Norwegian law, regardless of whether this implied that he would roast, boil or burn (*steyke siwde eller brenne*).⁸⁴ We do not know which legal basis supported such a statement. As Hamre notes, neither the decree of 1392 which amongst other concerns cases under Christian law which entailed outlawry, nor the Christian laws, mention roasting, boiling or burning.⁸⁵ The decree of 1478 allows for *landsvist*. This was a possibility, which considering his wealth, should have been open to Nils Lykke. There may have been political reasons preventing such a

⁸⁰ Lars Hamre, *Norsk politisk historie 1513–1537* (Oslo: Det Norske Samlaget, 1998), pp. 639–642, 657–58, 713–714.

⁸¹ Hamre, *Norsk politisk historie*, pp. 668–673.

⁸² Ole Georg Moseng et al., *Norsk historie 750–1537* (Oslo: Tano-Aschehoug, 1999), p. 369.

⁸³ *DN*, XI, no. 621, pp. 708–709 [1535]; *DN*, XVI, no. 584, pp. 734–736 [1536].

⁸⁴ Hamre, *Norsk politisk historie*, p. 670. *DN*, XI, no. 624, pp. 713–714 [1535].

⁸⁵ Hamre, *Norsk politisk historie*, pp. 670–671.

solution. The archbishop apparently did not consider the events particularly loathsome; after all, he hesitated for quite some time before he intervened. It was probably pressure from Olaf's southern colleagues from the Council of the Realm, led by Vincens Lunge, which eventually caused the archbishop to act.⁸⁶ Nevertheless, it is beyond doubt that Nils Lykke's crime, whether in his own view or in that of the prosecution, was liable to punishment by death at the stake, as indeed was the outcome of the affair.⁸⁷

Both in Nils Lykke's and in the sodomite Alf's case mentioned above, reference is made to legislation as the legal basis for the sentence. Apparently, Nils Lykke himself understood that Norwegian law authorised that he might "roast, boil or burn". As far as Alf is concerned, his case is summed up thus: "According to facts and written law, we sentence him with life and property into the hands of his Majesty's bailiff to be punished to the full extent according to the law of Norway" (*Effther kenz gernyngher oc skreffwen lagh dømde wy tha hannum met liff oc gotz y (k)ongz ffoghet hendhet till fwllan reffzæn effther Noregz lagh*).⁸⁸ The legal document does not explicitly mention the death penalty. We do know that in this case the lawful punishment was also death at the stake because there was a surviving contemporary notice, made on the outside of the diploma, entitled "Sentence on Alf Botolfson who was burned" (*Domm paa Alff Botulfson somm brend bleff*). This is an important methodological point to make; it is possible that in other cases involving sexual crimes, or indeed also other medieval crimes

⁸⁶ When the southern councillors arrived in Trondheim around Christmas, Nils had already been executed and the Christmas festivities of that year were to be rather eventful. Vincens was killed by Olaf's men; the remaining councillors ended up in the archbishop's prison. In addition, Olaf himself had been playing a very interesting double game during the court proceedings against Nils Lykke. He represented both ecclesiastical and secular authority. As archbishop he had the right to sentence Nils for incest, and as the king's vassal in the town and its surroundings he could lock Nils up indefinitely at the fortress Steinvikholmen. Steinar Imsen, 'Den politiske tilstand i 1536. Hvilken politisk makt hadde Olav Engelbrektsson?', in *Nytt søkelys på Olav Engelbrektsson: Rapport frå eit seminar i regi av Det Kongelige Norske Videnskabers Selskab 10–11. oktober 2003*, ed. by Steinar Supphellen (Trondheim: Tapir, 2004), pp. 35–51; Hamre, *Norsk politisk historie*, p. 669.

⁸⁷ Hamre, *Norsk politisk historie*, p. 713. DN, XI, no. 621, pp. 708–709 [1535], notes that he ought to be "punished with fire and tar as a heretic ought to be punished" (*straffis met eld och tiere som eyn ketter bør at straffis*); DN, XVI, no. 584, pp. 734–736 [1536], notes that he was *røge* i.e., burnt (lit. smoked) to death.

⁸⁸ DN, XXII, no. 159, pp. 152–153.

which were so serious that the law prescribed outlawry, that the death penalty was in fact occasionally implied.⁸⁹

A case of incest similar to Nils Lykke's came before Oslo lawthing in 1576. Oluf Haraldsen had lain with his wife's sister and had had a child with her. Both of them were sentenced to death, "because no law is protecting them to keep their lives" (*epther thii at inghen log beskøtther them til liffuet*).⁹⁰ The case shows that lack of legal protection could lead to the death penalty. In a case of *kettery* in 1495 a woman was delivered into the custody of Henrik Krummedike together with everything she owned "penninge och gotz". The sources still note that no law could protect her: "kwnne enggen lagh eller wern gøre ther fore". However, we do not know how the case ended.⁹¹ Both before and after the Reformation some crimes entailed the death penalty because, it is explained, the culprit was not protected by the law. For cases of sodomy and incest, as with Alf and Nils Lykke's above mentioned cases, it was claimed that the stake was authorised by the law, even although the laws of the medieval and Reformation periods are quite silent on this issue.

Consequently, there are indications that the use of the stake in cases of particularly heinous sexual misdeeds and other serious crimes against God and King developed as customary law long before the legislation of the seventeenth century explicitly prescribed such punishment. This can also be seen in yet another serious case from 1597, noted in the records of the *Herredag*. The heretic Tom was beheaded and his head was displayed on a pole.⁹² Of importance here is the connection drawn by the steward between "right" (*rett* both in the sense of justice and due; and fire, *ild*). According to the steward, the heretic's "right" had originally been the stake: "forne miszdedere vor bleffuen benaadigt thill it suerdt, epther som eller hans rett haffde verit jlden".⁹³ It is likely that

⁸⁹ In a case of incest from 1411, *DN*, V, no. 478, p. 336, Roald agreed on a settlement regarding his outlaws deeds' (*wtleгда werk*) with Bishop Jacob of Oslo (Roald had lain with his wife's sister). It is said that the settlement had been made with the Church, "but not on behalf of the kingdom" (*en ey a konongdomsens wegna*), a formulation which indicates that the king's representatives were also interested in this case. If the culprits did not have the economic means to obtain *landsvist*, or if the royal representative did not agree to a settlement, it is not unthinkable that the culprit was executed.

⁹⁰ *Nils Stubs*, p. 137.

⁹¹ *DN*, IX, no. 422, p. 389.

⁹² *Norske Herredags-Dombøge*, IV, pp. 152–153.

⁹³ *Norske Herredags-Dombøge*, IV, pp. 45–46. Trondheim, 31 May 1597. The man is described as a misdeeder, *miszdedere* and that he had used heresy (*brugt ketterij*).

Norwegian law was subject to influences from Europe, where certain crimes such as incest between close relatives or bestiality were considered so grave that the culprit's body had to be destroyed at the stake in order to avert God's wrath.⁹⁴ The use of the stake in Scandinavia both before and after the Reformation corresponds fully to the pattern Trevor Dean discerned for the remainder of medieval Europe. Burning was for crimes requiring "extreme purification by the total elimination of the offender's body": sodomy, incest, sorcery, infanticide.⁹⁵

In the case of the sodomite Alf, mention is made of "punishment according to the law" (*reffzæn effther Noregz lagh*).⁹⁶ *Refsing* is an Old Norse term meaning punishment or the execution of a judgement.⁹⁷ In the laws, it is usually connected to the Crown's authority in criminal matters and the term frequently occurs in connection with the death penalty or physical punishments. The king himself could authorise serious physical maltreatment to "clean the country" (*landreinsanar*) according to the *Landslaw*. The law lists the severing of hands or feet, gouging out of eyes, cutting out of tongues, castration, and general mutilation, (*eða meiðir mann*).⁹⁸ A decree from the early fourteenth century authorised docking (cutting off an ear) for whores, thieves, accomplices and other outrageous people *odadafolc* who returned to the town of Bergen after they had been banned from the town. In addition, these people had to "drage sten aff by" [carry stones] which was a typical public humiliation punishment.⁹⁹ In Scandinavia, the ignominious punishment of carrying stones was imposed mainly on women and which according

⁹⁴ Trevor Dean, *Crime in Medieval Europe* (London, Harlow: Longman, 2001), p. 124, for the period 1200–1550. There is a chronological overlap between the European late Middle Ages and the last and most formative part of the Norwegian high Middle Ages. It is interesting to note that Jørgensen quotes a view of professors from 1561, where it is said that "our Danish law... is used to punish such heretic and transgression of the natural law with fire" (*vor danske lov... plejer at straffe sådan kættersk og naturlig lovs overtrædelse med ild*), so the reference framework seems to have been defined by actual practices. It is however, not said how closely the culprits needed to be related, so that the heretic acts would entail an execution. Jørgensen, *Dansk Strafferet*, p. 381.

⁹⁵ Dean, *Crime* p. 124, quoting N. Gonthier, *Le châtement du crime au Moyen Age*. Compare the view on the stake in Nordic Early Modern times by Næss and Österberg, 'Sanctions', p. 155. "Burning at the stake—the penalty for cases of witchcraft, incest, murder, infanticide and bestiality—[...]"

⁹⁶ DN, XXII, no. 159, pp. 152–153.

⁹⁷ NgL, V, p. 509.

⁹⁸ L IV 3–4, (NgL, II, p. 50), *Magnus Lagabøters landslov*, p. 45. Cf. a decree by Håkon Håkonsson from 1260, L X I-3, (NgL, II, p. 175), *Magnus Lagabøters landslov*, pp. 191–192.

⁹⁹ NgL, III, p. 210.

to Lizzie Carlsson was introduced via Lübeck. It dates from the late twelfth century onward in French bye-laws, and during the thirteenth century it was common all over Europe. The instrument consisted of two stones which were connected by a chain and it was usually kept in the guardhouse, the town hall or another public place.¹⁰⁰ I did not find any examples where this sentence was meted out to sexual offenders. However, in a case against a liar and defraudster brought before the lawthing in Bergen in 1592, the offender was to “loose the ear and carry stones out of the city” (*miste Ørett oc drage Steene aff byenn*) if he did not accept banishment. It needs to be highlighted, however, that the court added that for such outrageous people a sentence like this “had been customary for a long time in this city” (*dett wdi Lang tid haffuer werit sedwanliggt herwdi byenn*).¹⁰¹ This shows that such sentences were in fact well-known and applied, despite the rather meagre surviving evidence of such a legal practice.

Mutilation and various humiliating punishments are equally well-known in contemporary Scandinavia and Western Europe at large.¹⁰² As mentioned above in this chapter, early laws including Christian laws, allowed for corporal punishments, usually of slaves.¹⁰³ Regarding the consequences for the culprit, the distinction between the death penalty and other corporal punishments may have been minimal, for example in cases of amputation of hands or feet where there was little chance of survival.¹⁰⁴ The possibilities of surviving were probably better when noses or ears were cut off.

The king's authority to punish is also evident in the decree concerning outlaws issued by Queen Margarete in 1392. The decree orders that if a person is arrested who is not at that time within the king's peace,

¹⁰⁰ KL, XV, pp. 395–400. Lizzie Carlsson, ‘De medeltida skamstraffen: Ett stycke svensk kulturhistoria’ *Rig* 1934, p. 130. Carlsson lists examples from legal practice.

¹⁰¹ [http, p.//digitalarkivet.uib.no/sab/raadstu1.htm](http://digitalarkivet.uib.no/sab/raadstu1.htm) (30/03/2006). The case begins on fol. 13a.

¹⁰² Some examples from law and legal practice are discussed by Carlsson, ‘De medeltida skamstraffen’, pp. 124–139.

¹⁰³ As an example of mutilation, see for example G § 259, (NgL, I, pp. 84–85), *The Earliest Norwegian Laws*, pp. 167–168. According to this, a “freedwoman or a native bondwoman” risked the loss of one ear in the first instance of thieving, in the second one loss of the other ear, and in the third one loss of the nose.

¹⁰⁴ G § 179, (NgL, I, p. 66). Cutting off of both hands and feet of a man is worse when done while he is alive than after his death. He shall then receive the same reparation as if he had been killed.

fridh konungsens; the king's steward shall punish him according to the law, "þa ræfsi konongs vmbodzmadrar honom æftir laghum".¹⁰⁵ In point 7 we see that members of the Council of the Realm which also included the archbishop and the bishops of Bergen, Oslo, Hamar and the Faeroes signed this decree. It may thus be assumed that the clergy was aware of the possible deadly consequences of such punishments. Indeed, they may wholeheartedly have supported the death penalty for serious crimes—obviously under the condition that the sentence was carried out by secular authorities, since taking the lives of others was forbidden for the Church.¹⁰⁶

Hamre proposes that the severity of sentences might gradually have increased in the period before the Reformation, when sexual crimes equated with heresy were punished by burning on the stake as was common with heresy proper.¹⁰⁷ But together with other forms of the death penalty, the stake had evidently been used in Norway already at the beginning of the fourteenth century. The so-called false Margarete, an impostor who claimed to be King Eirik Magnusson's daughter, was burnt in Bergen in 1301; her husband was beheaded. The genuine princess died in Orkney on her journey to Scotland where she should have succeeded to the throne.¹⁰⁸ In 1302 Audun Hugleiksson, one of the leading barons in Eirik Magnusson's minority government, was hanged in Bergen upon the orders of Håkon V.¹⁰⁹ It is worth noting

¹⁰⁵ *NgL*, 2 rk I, pp. 22–24.

¹⁰⁶ Erik Anners, *Humanitet och rationalism: Studier i upplysningstidens strafflagsreformer—särskilt med hänsyn till Gustav III:s reformlagstiftning* (Stockholm: A. B. Nordiska Bokhandeln, 1965), p. 20 describes how a professional executioner appears as a judicial institution in the thirteenth century, parallel to the appearance of special priests giving spiritual guidance to the convict.

¹⁰⁷ Hamre, *Norsk politisk historie*, pp. 671, 866.

¹⁰⁸ For a description of this case see *KL*, XXI, p. 322. In 1290 the Norwegian Princess Margrete (1283–1290) left Bergen with a large retinue to accede to the Scottish throne, succeeding her maternal grandfather King Alexander (d. 1286). But she sickened during the journey, and died seven years old. King Eirik opened the coffin in which the dead princess returned to Norway in person and confirmed her identity. In 1300, a woman arrived in Bergen claiming that she was Princess Margrete. She said that her foster-mother, Ingeborg Erlingsdatter, had sold her and that she had ended in Germany where she had been married. She wished to claim her inheritance in Norway. Although the woman herself admitted that she was around forty years old, while the real Margrete, born in 1283, would in 1300 have been seventeen years old had she lived, some priests in Bergen and parts of the population supported her. She was arrested and sentenced to death.

¹⁰⁹ *KL*, XXI, p. 322. He was imprisoned in Holmen (Bergenshus) for nearly three-and-a-half years, before he was transferred to the place of execution at Nordnes. The date of Audun Hugleiksson's death, 2 December 1302, is given in the Icelandic Annals, which

that he was hung like a common thief, he did not die by the sword as would have been a nobleman's right. In the same year a shipmaster was hanged for piracy.¹¹⁰ Admittedly, there is no evidence that people guilty of serious sexual crimes were sentenced to the stake during the thirteenth and fourteenth centuries. But we should pay attention to the statement Bishop Audfinn of Bergen (who succeeded his brother Arne as bishop of Bergen in 1314, remaining in office until his death in 1330) made in 1320; nineteen years after the false Margarete had been burnt at the stake:

Effther thij thet wor kun obenbarlige falsk och suig hun for med, tog hun sin ende dom brendendis ij enn boll, effther landtzens log och beste mendz raadt som tha wore i Norige i then stad paa Nordnesse som slig misgiernings folck ere von med reffsinge sitt lifff att lade.¹¹¹

Because of the obvious falsehood and deceit she continued with, she was, according to the law of the country and at the advice of the best men in Norway at that time, sentenced to death and burned at the stake at Nordnes where such offenders commonly are punished and lose their lives.

Also here reference is made to the law of the country being the legal basis for this type of capital punishment. According to Svale Solheim, Bishop Audfinn belonged to, and spoke for, the group of people who had sentenced the false Margrete to death nineteen years earlier.¹¹² Hamre argues that Biskop Audfinn probably considered Margrete's case particularly serious; the site at Nordnes attracted pilgrims, something the bishop wanted to stop.¹¹³ The crime was particularly grave also since it touched upon the interests of the Crown. As the *Landslaw* make

also state that he was hanged at Nordnes. As Gade, 'Hanging', p. 167 notes, hanging was a particularly denigrating form of execution.

¹¹⁰ *RegNorv*, III, no. 96, p. 55. In addition, the royal steward confiscated goods and ships.

¹¹¹ *DN*, VI, no. 100, p. 104.

¹¹² Svale Solheim, 'Historie og munnleg histroisk visetradisjon', *Norveg* (1973), p. 111, names Lars Hamre as the translator of the letter. I am indebted to Gunnar W. Knutsen for bringing the article to my attention.

¹¹³ Lars Hamre, 'To bergenske kyrkjehovdingar, bispebrørne Arne og Audfinn', in *Kongsmenn og krossmenn. Festskrift til Grethe Authen Blom*, ed. by Steinar Supphellen (Trondheim: Tapir, 1992), pp. 152–153. The same bishop was also involved in the case against Ragnhild Tregagås, which included accusations of incest, adultery and witchcraft (the latter directed against eroticism). Here, the bishop took into consideration the fact that Ragnhild could not be held responsible for her actions, she was moonstruck; but in case of recurrence she was to be transferred to the secular authorities.

unmistakably clear, high treason was considered the greatest felony.¹¹⁴ Execution at Nordnes was however not reserved for traitors. Bishop Audfinn names Nordnes as an established place of execution already at the beginning of the fourteenth century, and it was also there that the sodomite mentioned by Absalon Pederssøn was executed in 1564.

It is obvious that capital punishment of the early fourteenth century, and later, took various forms: beheading, hanging, and burning at the stake. Some forms of the death penalty may be seen as a collective process of purging, directed by public authority. The aim was to eradicate the sin, so as to re-establish social order. Such concepts are well-known from the seventeenth century and, as Øyrehagen Sunde argues, they also characterise the *Norwegian Law* of 1687. During the apportioning of sentences, the theory of the four elements—earth, fire, air and water—played a central role because they were considered particularly well-suited for the process of purging. When the criminal was burnt, his mortal remains dissolved into the air together with the smoke from the fire, or they were united with the earth when the ashes and bones were buried at the place of execution.¹¹⁵ Connected to this theory is also the role water played in the sentencing of married women who had whored thrice: these were to be drowned. Here it is important that we highlight the continuity of these concepts. The connection between the theory of the four elements and their important role in the fight against serious crimes was also made in medieval times.¹¹⁶ In Norwegian law, it is interesting to note that a provision of the *Landslaw* concerning crimes which could not be compensated for by a fine states that the king or

¹¹⁴ As the *Landslaw's* L IV 3–1, (NgL, II, p. 49), *Magnus Lagabøters landslov*, p. 44 make unmistakably clear, high treason was considered the greatest felony.

¹¹⁵ Sunde, *Speculum legale*, p. 249.

¹¹⁶ In the chapter “Political Sorcery at the Turn of the Fourteenth Century” Edward Peters in Part 3, ‘The Medieval Church and State on Superstition, Magic and Witchcraft: From Augustine to the Sixteenth Century’ in *Witchcraft and Magic in Europe*, ed. by Stuart Clark and Bengt Ankarloo (Philadelphia: University of Pennsylvania Press, 1999), p. 220 argues that this view is anything but dead. After Jeanne of Navarre, wife of the French King Philip IV, had died in 1305, Bishop Guichard of Troyes and several others were accused in 1308 of murdering the queen and her mother by sorcery and poison. The following years saw similar cases brought to court. King Philip feared that the sorcery and the dangers associated with it would defile his Christian kingdom. “Against so criminal a plague everything must rise up: laws and arms, every living thing, the four elements”. The king’s fear is also exemplified in his attack on the Templars. They were accused of blasphemy and sorcery (and according to Brundage, *Law, Sex, and Christian Society*, pp. 472–473 also homosexuality).

his ombudsman shall punish *refsa* “til landðreinsanar oc friðar”.¹¹⁷ To be sure, *landðreinsanar* here translates as “liberating/cleansing the country from the criminal”. Nevertheless, we cannot exclude that there were also religious aspects to this cleansing.¹¹⁸ We have seen in a number of cases where it was insufficient to take the criminal’s life; one also wanted to destroy the sinner’s body. The most likely reason for this is a wish to purge. A less extreme version was banishment, which already our oldest Christian laws connect to outlawry. This was probably inspired by Anglo-Saxon law. Absalon Taranger has shown that at the time of St Olaf’s stay in England persistent obstreperousness against the Church’s teachings was often punished by banishment, which assumed the role of a “purge” in as much as the people were rid of all un-Christian elements.¹¹⁹ Opposition to the Church’s commandments was considered equal to dissociating oneself from Christianity and God’s will. Punishments also included more drastic measures.

Already before the Reformation, there is documentary evidence that not only in Norway, but also in other parts of Scandinavia, people were burnt at the stake because of sexual crimes, witchcraft, and arson with intent to kill,¹²⁰ while thieves were hanged (connected to the element air).¹²¹ According to the *Old Christian Law of the Gulathing* sorcerers and witches were to be struck on the back and drowned, and Robberstad notes that an older version of this provision states explicitly that sorcerers

¹¹⁷ L IV 4, (*NgL*, II, p. 51), *Magnus Lagabøters landslov*, p. 46, for instance regarding the abduction of women: “þeir menn sem konor taka með rane eða herfange”.

¹¹⁸ *NgL*, V, p. 380 *landreinsan* with reference to G § 32, F V § 45, L IV 3, 4, X 1, with the meaning of delivering the country via rules for law enforcement authorities and arresting of roving criminals. According to *NgL*, V, p. 512, *reinsa* can have a religious meaning such as hallowing and purging as happens at baptism.

¹¹⁹ Taranger, *Den angelsaksiske kirkes*, pp. 299–300.

¹²⁰ Folke Ström, *On the Sacral Origin of the Germanic Death Penalties* (Lund: Håkan Ohlssons Boktryckeri, 1942), p. 190 points out that in the Swedish law of the Uppland punishment at the stake was prescribed for harmful sorcery. In a case from Greenland from 1407 Kolgrim resorted to the black arts (*svartakonsturm*) in order to lie with a married woman, for which he was sentenced to burn, “brendur eptir dom”. See the detailed discussion in Stephen A. Mitchell, ‘Gender and Nordic Witchcraft in the later Middle Ages’, *Arv: The Yearbook of Scandinavian Folklore* 56 (2000), p. 15; the source has been published in *Islandske Annaler indtil 1578*, ed. by Gustav Storm (Christiania: Grøndahl & Søns Bogtrykkeri, 1888), p. 288. In Sweden, one case from the fifteenth century and dozens from the sixteenth century are known; Jonas Liliequist, ‘Tidelagstabuet i 1600-och 1700-talets Sverige’, *Historisk Tidsskrift* [Sweden] X (1985), p. 288.

¹²¹ Hanging as a punishment for thieves seems to have been common throughout medieval Northern Europe, as documented by Gade, ‘Hanging’, see also *KL* V, pp. 163–164.

shall be sunk to the bottom of the water.¹²² Originally, drowning was reserved for people engaging in harmful sorcery or witchcraft. The sagas describe how sorcerers were drowned; Folke Ström lists several sources which show that it was common to tie a stone round the neck of the culprit and then push him or her into the water. The practical advantage of the stone was that it facilitated the drowning while at the same time ensuring that the sorcerer would remain at the bottom of the sea or lake.¹²³ Also animals that had been sexually abused were to be drowned.¹²⁴ Some Swedish regional laws however prescribe that the criminal and the animal were to be buried alive.¹²⁵ The same punishment was envisaged for unfaithful wives in Danish town legislation from the mid-fifteenth century.¹²⁶ A consideration of sources from the whole of Scandinavia allows us to conclude that all four of the elements played a role in the sentencing of criminals long before the Reformation. This is amply documented in legislation and in some cases in legal practice too.

Particularly the punishments of the abused animals makes it clear that we are dealing with legal concepts which were interested in more than just the punishment of a criminal offence; the aim was rather to re-establish social order by eradicating all traces of the horrendous sin. In 1709 for instance, Telste notes a case from Ringerike and Hallingdal where both the man and the cow were sentenced to burn at the stake, based on the *Norwegian Law* of 1687 6–13–15, a provision which actually does not explicitly state that the animal should be killed.¹²⁷ From the early eighteenth century the Bergen lawthing obeyed the Mosaic command to kill the animal.¹²⁸ Even as late as 1783 Viskum reports a case where three abused cows were shot and subsequently buried.¹²⁹

¹²² G § 28, (NgL, I, p. 17), *Gulatingslovi*, p. 43, *The Earliest Norwegian Laws*, pp. 56–57.

¹²³ Ström, *On the Sacral Origin*, pp. 171–173.

¹²⁴ G § 30, (NgL, I, p. 18), *The Earliest Norwegian Laws*, p. 57.

¹²⁵ KL, XVIII, 'Tidelag', pp. 269–269 gives a reference to several Swedish laws—regional ones and the Royal *Landslag* of 1442—where both the stake and burying alive are noted as punishments.

¹²⁶ KL, XX, 'Ægteskabsbrud, Danmark', p. 502 notes that in certain circumstances *Christopher of Bavaria's Townlaw* 53 prescribes that a man guilty of adultery was to be beheaded, while the woman was to be buried alive.

¹²⁷ Telste, *Mellom liv og lov*, pp. 195–196.

¹²⁸ Torleif Hansen, *Bergen lagting som straffedomstol i appellsaker 1702–1737: En undersøkelse av appellordningen og domspraksis* (Bergen: Alma Mater Forlag AS, 1993), pp. 198–201 discusses four cases which came before the Bergen lawthing during the period 1702–1732. One of them ended with a death sentence, and in that case also the cow was to be killed.

¹²⁹ Viskum, 'Fortielse og straff', p. 101.

Neither the younger Christian laws, nor the decree of 1478 or the *Norwegian Law* of 1687 say anything about whether the animal concerned was to be killed. It is however, not unthinkable that the custom was so well established that it was obvious. The Bible, indeed, assumes that the animal needed to be destroyed (*Leviticus* 20), and the *Old Christian Law of the Gulathing* stipulates that an animal that had been abused was to be drowned.¹³⁰ This rule was continued by the so-called case-lists, containing summaries of Christian laws, and which were taken down in sixteenth-century law-books. These frequently have the explicit addition that “the chattel shall be sunk”.¹³¹

The extensive Swedish source material from the seventeenth and eighteenth centuries document this practice as well. Moreover, the belief that cohabitation between man and animal could produce offspring was widespread. There are even reports of men who “jumped off in mid-act”, and methods of contraception were certainly practised. The sodomites themselves admitted that they took precautions so that there would be no visible results from their contact with animals.¹³²

The bodies of both man and animal were defiled when they “intermingled”. Also the meat of the abused animal was considered unclean. The *Old Christian Law of the Gulathing* not only stipulates the drowning of the abused animal but also stresses that anyone who used it for food was to be fined a substantial 3 marks.¹³³ Drowned animals were otherwise legal to eat, because as Handeland notes, this is explicitly pointed out in the *Old Christian Law of the Frostathing* as well as the *Old Christian Law of the Borgarthing*.¹³⁴ For a very long period the notion that the abused animal was to be destroyed and not consumed as food prevailed. In sources from seventeenth and eighteenth century Sweden it seems that both the court and the populace at large took great pains to track the abused animals and only in cases of extreme

¹³⁰ G § 30, (NgL, I, p. 18), *The Earliest Norwegian Laws*, p. 57.

¹³¹ Anne Irene Riisøy, ‘What’s on the Case-list? Legal Texts and Felonies Rediscovered’, *Scandinavian Journal of History* 27, (2002), pp. 77–89; Anne Irene Riisøy, ‘Sakslister: Kristenrettslovgivning i kortform: Oppkomst og opphør’, in *Rett, menneske, manuskript. Rettshistoriske studier vol. 17—institutt for offentlig retts skriftserie*, ed. by Jørn Øyrehagen Sunde (Oslo: Institutt for offentlig rett, Universitetet i Oslo Unipub, 2006). The case-lists mainly date to the post-Reformation sixteenth century.

¹³² Liliequist, ‘Brott, synd och straff’, pp. 148–152.

¹³³ G § 30, (NgL, I, p. 18); (ascribed to both Olaf and Magnus). See also F III § 18, (NgL, I, p. 153).

¹³⁴ Handeland, ‘I lyst og last’, p. 88. F II § 42, (NgL, I, pp. 144–145), *The Earliest Norwegian Laws*, pp. 242–243 cf. B I § 5, (NgL, I, p. 341).

poverty did people eat the abused animal. Even before the case was closed, if suspicion was aroused, people would avoid drinking the milk from the suspect cow.¹³⁵

Jan Eric Almquist discusses an interesting Swedish example of the continuity of concepts of impurity. In the second half of the seventeenth century (the exact date is unknown) the people from the district of Meming sent a letter to the government of King Karl XI, asking that sodomites be spared the stake. Upon closer investigation it appeared that this wish did not stem from empathy with the culprits, but from an assumption that the smoke from the stake would cause crop failures if it wafted across fields and meadows. The formulation that this was “an evil and old popish disbelief and custom” (*en ond och gammal papistisk vantro och sedvana*)¹³⁶ show that this belief clearly stem from the Middle Ages. At the very least, this letter shows that in parts of Sweden sodomites were burnt at the stake already before the Reformation and presumably in such large numbers that it was possible to believe that harm could be done by the mere smoke from the stake. This further highlights the continuity in the view of bestiality as an extremely unclean act.¹³⁷

Sentences which ensured that every trace of the offence was eradicated therefore contributed to averting God’s wrath, which was an important motivation during the Middle Ages as well as in the sixteenth and seventeenth centuries.¹³⁸ Breaking God’s law could unleash God’s wrath not merely onto the individual who had committed the crime but onto the entire community. This is made explicit by *Leviticus* which describes all thinkable and unthinkable forms of prohibited sexuality, and which

¹³⁵ Liliequist, ‘Brott, synd och straff’, pp. 148–151.

¹³⁶ Jan Eric Almquist, ‘Tidelagsbrottet. En straffratts-historisk studie’, *Uppsala Universitets Årsskrift* (1926), p. 21. The letter is extant and included in an undated collection of letters. Ström, *On the Sacral Origin*, p. 198 shows that similar ideas concerning smoke from the stake at which sorcerers had been burnt were prevalent in Denmark. So even if society was purged when sodomites and sorcerers were burnt, the population was not necessarily happy with the form of execution since fields and meadows could be contaminated by the smoke and the ash from the fire.

¹³⁷ According to Bengt Ankarloo, ‘Om manfolk och fa. Jonas Liljequist anm av Bengt Ankarloo’, *Historisk Tidsskrift* [Sweden] 1 (1993), pp. 160–161 popular protests against the stake in Sweden were motivated by the fear that the smoke from the death-fires constituted a danger for the crops, and the terror instilled by the burning of unsaved souls. Liliequist, ‘Tidelagstabuet’, p. 297 underlines that the Reformation expanded these medieval traditions that Creation as a whole was disturbed.

¹³⁸ Sunde, *Speculum legale*, p. 249, notes that the *Norwegian Law of 1687* is characterised by this view of punishment.

concludes in *Leviticus* 18 that both the involved parties and the country are polluted. In order to re-establish the community's relationship with God the offender needed to be punished. Bastiansen, who examined extramarital sexuality in Bergen after the Reformation, finds evidence for precisely this idea expressed by Absalon Pederssøn in 1567.¹³⁹

*O Bergen, Bergen naar viltu een sinne lade aff at bruge Hord, skørleffnit, druckenskab, mandslecht, ieg frøchter dette høge fiel som fløien paaa staar, lucker dine øgen til, saa at mand skal sige om dig. Et rudere vbi Berginum fuit. Item fuit Berginum, Magna calamitas tibi impedit ni resipueris.*¹⁴⁰

Oh Bergen, Bergen when will you ever stop your whoring, debauchery, drunkenness, manslaughter, I fear this high mountain which stands at Fløyen, will close your eyes, so that people will say about you: See the mounds of gravel where Bergen was situated. You are threatened with great misfortune if you don't recover your senses.

Yet similar exclamations, where the inhabitants of Bergen feel threatened with a fate reminiscent of Sodom and Gomorrah are not found exclusively in the post-Reformation period. Already in 1390 Bishop Jacob of Bergen wrote to the townspeople that the unclean and sinful lifestyle found in Bergen (*þat oreinligt ok sundalight liferne*) put the town in great danger (indeed, the whole district, *heradet*), of being laid to waste (*legst i eyde*).¹⁴¹ The bishop was particularly alarmed by sexual excesses. Supposedly there was no other town of comparable size in all of Christendom where there were more concubines, more insults to virgins and more violations of marriage. It was probably no coincidence that the letter was read aloud to the parishioners of Christ Church, which was situated near Bryggen where the German Hansa and the young temptresses were to be found.

If we go slightly further back in time, we also see that the *King's Mirror* presents the punishments of God's as a logical consequence of a sexually promiscuous life. One example is the Prophet Jonas, whom God sent to Nineveh to warn the king and his people that Nineveh would be laid to waste within thirty days. When the king understood that God had turned his wrath against them because the people were full of injustice and indulging in adultery, he repented, fasted and asked the people to follow his example. When God saw their repentance the town and its people were spared. Kristoffer Vadum has also shown that

¹³⁹ Bastiansen, 'Væ dig Bergen', p. 28.

¹⁴⁰ *Absalon Pederssøns dagbog*, p. 127.

¹⁴¹ DN, III, no. 487, p. 365; *RegNorv*, VII, no. 1584, pp. 526–527.

the examples of God's judgements included in the *King's Mirror* almost always concern life-or-death situations, and that the sentences regularly point towards the death penalty.¹⁴² If capital punishment had been as unusual in High Medieval Norway as is often argued, the examples of sentences depicted in the *King's Mirror* are paradoxical. If we however turn our accustomed views upside down, the punishments shown in the *King's Mirror* might have been consciously chosen in order to support the authority of a judgmental and punishing king.

The quoted example from the mid-thirteenth-century *King's Mirror*, the statement about Bergen inhabitants' immoral way of life in the late Middle Ages as well as during the century of the Reformation express much of the same concept. It was possible to denigrate God to such an extent that he wished to eradicate every trace of the sin via a collective punishment. The continuity of these views shows that the principle of equivalence was present during the high Middle Ages and until long after the Reformation. The connection between punishment and purging in the *Landslaw* indicates that also high medieval criminal law incorporated religious ideas about sin and purging, and not only with regard to criminality but also to society at large.

The belief that God avenged himself on the country and people if a sin was not sufficiently punished, as well as the view that punishment was a means in which the authorities could avert God's wrath are connected to the concept of the divine right of kings laid down in canon law. Criminal acts were an infringement on God's law, and making amends to God was a necessary duty. The king in particular, as ruler of the country, had a unique responsibility to fulfil this obligation. Folke Ström highlights the long continuity of such views in a wider European context.¹⁴³ We have innumerable and diverse examples of the view that criminal acts needed to be punished in order to avoid the consequences of God venting his wrath on the people and thereby threatening the country's very existence. Renaissance Venice (c. 1300–1500) offers a particularly rich source material and Guido Ruggiero shows that burning at the stake as a punishment for homosexuality was based on the Biblical story of Sodom and Gomorrah. It was feared that God would destroy the whole

¹⁴² Vadum, *Dom og straff*, p. 60.

¹⁴³ Ström, *On the Sacral Origin*, pp. 69–71, 78–79, 98 points out that this idea continues into modern times, "without in the course of development undergoing any change worth mentioning, as regards its substance; and it often peeps forth in the motivations given by the authorities for their pronouncement of the death penalty", quote p. 70.

fleet if such malpractices continued on board Venetian ships. In contrast to fines and short-term imprisonment, the usual punishment for less serious sexual crimes, the extremely harsh sentence of burning at the stake indicates that homosexuality was considered a direct attack on God and God's Creation.¹⁴⁴

After Death

In addition to the general religious and moral aspects, capital punishment was also significant on the individual psychological level, in relation to the fear of eternal damnation. Øyrehagen Sunde argues that the brutal sentences of the *Norwegian Law* of 1687 had been deliberately included because of their desired preventive effect. People should not only be afraid of physical death but also fear the highest judgement and agonise over the fact that they might not go to heaven. For instance a person who was condemned to death by burning and denied Christian burial was unable to rise on the last day of judgement.¹⁴⁵ There is a long continuity in these legal-religious concepts. Fear of damnation was always present in medieval and Early Modern people, who viewed their short and brutal earthly existence as merely preparation for the eternal life.

From the period 1300–1600 I have found some cases where the details of the sentence extended to the churchyard. In a case of adultery which was reopened by the *Herredag* in Oslo in 1585, the court reached the conclusion that judicial murder had been committed. The previous judgement was annulled, and the twelve jurors who had passed it were ordered to exhume the executed from the place of execution and to transfer his body to the churchyard for a proper burial. The basis for the sentence had merely been a woman's accusation and the feudal lord's charge. Afterwards it was found that the woman had herself been sentenced to death for her misdeeds (*miszgierninger*) some years earlier, a sentence which had obviously not been executed.¹⁴⁶ Documents from the *Herredag* in Trondheim from 1597 show that a man called Mikkell brought an action against the steward in Stordalen, Nils Hansen. In the

¹⁴⁴ Ruggiero, *The Boundaries of Eros*, p. 111.

¹⁴⁵ Sunde, *Speculum legale*, p. 251.

¹⁴⁶ *Norske Herredags-Dombøge*, III, pp. 63–67.

name of the relatives of the poor tailor Søren Madsen, Mikkel had paid the steward 10 riksdalers to assure that the heretic Søren was buried in the churchyard. When the steward instead let the heretic's head be placed on a pole and his corpse placed underneath, Mikkel of course asked to have his money back. The steward argued in his defence that he had received the ten riksdalers in order to change the punishment from burning at the stake to beheading, but the court was not convinced. When it could be shown that the governor Ludvik Munk had issued an open letter to the effect that the tailor was to be buried on the churchyard the 10 riksdalers were returned to Mikkel.¹⁴⁷ These two cases were dealt with by the *Herredag*, the highest court in the kingdom. At a local level priests might have been more actively involved; Johannes Steenstrup discusses how Danish priests in Zealand towards the end of the sixteenth century were reluctant to grant burial to outlaws and other criminals.¹⁴⁸ The situation in Norway might have been similar.

During the above-mentioned excavations in the old churchyard at Skien, among the other skeletons, three were found that had been beheaded. In all likelihood, the skeletons date from the period of the Reformation. Two of the heads were facing downwards; the third had in addition to the beheading also been burnt, and the head had been placed between the legs. Gaute Reitan explains that in this way the executed had no chance of seeing Christ's arrival from the east on Judgement Day. This privilege was also denied to the owners of the heads from the same chronological level, which had been arranged neatly in a semi-circle. In addition they lacked a body, which according to the ideas at the time made it impossible for them to be resurrected.¹⁴⁹

In an age where the belief in the resurrection of the body on the last Day of Judgement was firmly dependent upon whether the deceased had received a Christian burial or not (although theologians may not have taken such a clear-cut view), the question of whether capital punishment precluded burial in consecrated ground was an important one. In a letter from 1492 a whole family was pardoned by Bishop Eilif of Stavanger for failing to carry out the dean's order to exhume and remove the body of

¹⁴⁷ Norske Herredags-Dombøge, IV, pp. 45–46.

¹⁴⁸ Johannes Steenstrup, 'Fredløs. Betydningen af denne Straf og Tvang i de Sidste Aarhundreder af dens Bestaaen', *Historisk Tidsskrift* [Denmark] 10rk 1st vol. (1930–31), pp. 408–409. Regarding questions of burial in the protestant tradition see for instance Craig Koslofsky, 'Honour and Violence in German Lutheran Funerals in the Confessional age', *Social History*, 20 (1995), pp. 327–328.

¹⁴⁹ Reitan, 'Fra kokegroper', pp. 183–184.

the outlaw Sveinung Aslaksson from the churchyard. The bishop states rather laconically that the outlaw Sveinung's body "shall have to rest in the churchyard because it is buried together with the corpses of other good Christians" (*maa liggæ nu framdeles i kirkæ gardh som kommen er med andhrom godæ kristnæ manne liik*).¹⁵⁰ The bishop's resignation in this situation reflects stipulations in the younger Christian laws which state that bodies that had been buried illegally, but which had been in the ground for so long that it was no longer possible to "distinguish their bones from the bones of other Christian people" (*skilia bein thieris fra annar christna manna beinom*), should remain in situ.¹⁵¹ The parallels to canon law are obvious and, as Betil Nilsson has shown, this issue was debated in Norway at the latest around the year 1200.¹⁵²

Already our oldest Christian laws contain detailed rules for burial in consecrated ground, which was therefore not open to all people. The relevant paragraphs in the various Christian laws provide a list of these people. The Christian laws of the mid-thirteenth century basically exclude the same categories of people from Christian burial, while they also introduce a few exceptions to these rules. If a person called on the priest before dying and confessed, then the priest had the power to grant permission for a Christian burial.¹⁵³ Denial of burial in consecrated ground needs to be seen as a second punishment in addition to the

¹⁵⁰ DN, I, no. 975, p. 702.

¹⁵¹ NB II § 10, (NgL, IV, pp. 166–167); NB I § 8, (NgL, II, p. 296); NG I § 16, (NgL, II, pp. 314–315); J § 16, (NgL, II, p. 350). If people were buried on the churchyard who had no right to this, those who had buried them had to pay a fine to the bishop and cover the expenses of having the churchyard re-consecrated.

¹⁵² Bertil Nilsson, *De sepulturis: Gravrätten i Corpus Iuris Canonici och i medeltida nordisk lagstiftning* (Stockholm: Almqvist & Wiksell, 1989), p. 40 refers to an answer sent by Innocent III to the archbishop of Nidaros in 1200, which shows that the latter had asked about what was to be done if bodies of excommunicates were buried on the churchyard. The pope replied that these should only be removed from the churchyard if they could be identified. Faced with two evils, the decision was to avoid the danger that Christian dead would be removed from the churchyard. This view is shared by the *Decretum* and by other canonists. DN, XVII, no. 10, pp. 9–10 [1200] is translated into Norwegian in *Latinske dokument til norsk historie: Fram til år 1204*, ed. and trans. by Eirik Vandvik (Oslo: Det Norske Samlaget, 1959), no. 39, pp. 125–127. Archbishop Eirik was then living in exile in Denmark because of the quarrel with the king. As Vandvik points out, the contact with the pope was most likely initiated because of the excommunication of King Sverre and his followers. For a discussion of this turbulent period and the archbishops' exile, see Ólafía Einarsdóttir, 'Erik Ivarsson of Trondheim. Archbishop in exile in Absalon's Lund 1190–1202', in *International Scandinavian and Medieval Studies in Memory of Gerd Wolfgang Weber* (Trieste: Parnaso, 2000), pp. 367–381.

¹⁵³ I have discussed these rules in Riisøy, 'Outlawry and Ecclesiastical Power', *passim*.

sentence proper. Indeed, the double jeopardy rule might have caused problems in such cases, since Roman law, which Gratian then developed further, did not allow two prosecutions for the same offence (*ne bis in idem*). A culprit who had been sentenced to death and who was then also denied a Christian burial would be punished twice. Generally, any member of the Church was entitled to be buried in the churchyard after having repented and confessed one's sin, and after having been re-integrated into the ecclesiastical community. However, secular authorities assumed that the threat of having one's remains interred in unconsecrated ground acted as a strong deterrent to potential criminals. The solution proposed in Gratian's *Decretum* was that a Christian burial was to be permitted provided the secular authorities had consented.¹⁵⁴

This view is reflected in the mid-thirteenth century Christian laws, because regarding outlaws henceforth the king's approval was also required to obtain a Christian burial. In addition, the outlaw's heir was also obliged to compensate for the deceased outlaw's crimes.¹⁵⁵ In the case from 1492, it was the fact that Sveinung Aslaksson had been outlawed which barred him from being buried in the churchyard. This shows that the provisions of the younger Christian laws, which included both ecclesiastical and secular criteria (for example excommunication and outlawry) as a basis for exclusion from Christian burial, were applied.

In this chapter I have focused on elements that highlight the continuity within different aspects of the death penalty, from the medieval to the Early Modern period. The king and his stewards were supposed to have a monopoly on punishment, and it could possibly end with the culprit's death. The relationship between outlawry and royal pardons, as expressed through the institution of *landsvist*, points towards the existence of the death penalty during the Middle Ages. Then I discussed views on punishment as a means of purging society in order to avert God's wrath, where I concluded that this legal concept had already existed during the Middle Ages as well. In addition, the Christian laws ensured that certain categories of criminals, among them those convicted of serious sexual crimes, were denied burial in the churchyard.

¹⁵⁴ Nilsson, *De sepulturis*, p. 260.

¹⁵⁵ NB II § 10, (*NgL*, IV, pp. 166–167); NB I § 8, (*NgL*, II, p. 296); NG I § 16 (*NgL*, II, pp. 314–315); J § 16, (*NgL*, II, p. 350).

A potential criminal had to live in fear of losing not only this life but eternal life as well.

We do not know how common the death penalty was before 1600. Presumably, Hans Eyvind Næss and Eva Österberg are right to argue that fines must have been the most widespread type of punishment, also during the century of the Reformation.¹⁵⁶

¹⁵⁶ Næss and Österberg, 'Sanctions', p. 162.

CHAPTER FIVE

FINES AND CONFISCATION OF PROPERTY

An important aim of this chapter is to show that both during the Middle Ages and after the Reformation, the same categories of sexual crimes were punishable by fines and confiscation of property. This claim necessitates that we pick up again the discussion from the preceding part regarding the criminalisation of sexual acts. There I documented that adultery and fornication, which together made up approximately 90 percent of sexual crimes, had also been criminalised in the Middle Ages. We shall therefore reject the prevailing claim that first after the Reformation, harsh punishments were introduced for sexual acts that had not been liable to prosecution in the Middle Ages.¹ A comparison of different categories of sexual crimes from my own study with corresponding studies on the seventeenth century indicates continuity both in terms of the classification of offences being based on the size of fines, as well as the variations of fines within one and the same category.

As far as adultery is concerned, the younger Christian laws distinguish between simple and double adultery. According to the *Young Christian Law of the Borgarthing* II this accounts for fines of 3 and 6 marks, respectively.² We do not have any information from the medieval laws concerning the fines for fornication. Regarding incest, the same Christian laws prescribed fines which increased proportionally with the degree of kinship, from third cousins to nieces and nephews. The fines amounted to 1.5 marks for the fourth degree, 3 marks for the third degree and 4.5 marks for the second degree.³ The fact that, in the same Christian law, the fine for incest in the fourth degree was lower than that for simple adultery shows that the paragraph on incest also applied to relations between two unmarried but related persons; it is

¹ Telste, *Mellom liv og lov*, p. 69; Aarset, *Rettslig regulering av homoseksuell praksis*, p. 22; Bastiansen, 'Væ dig Bergen', p. 28.

² NB II § 22, (*NgL*, IV, p. 173); cf NB § 18, (*NgL*, II, p. 301); NG § 26, (*NgL*, II, p. 320); J § 44, (*NgL*, II, p. 371).

³ NB § 21, (*NgL*, II, p. 302); NG § 30, (*NgL*, II, p. 322); J § 47, (*NgL*, II, p. 372); NB II § 25, (*NgL*, IV, p. 175).

quite likely that the fine for fornication was slightly lower still. This can be supported by the evidence from the penitentials. Already Thórlákr of Skálholt's penitential prescribes 3 years' penance for fornication, much less than for simple adultery which entailed 7 years' penance.⁴

Persistent adulterers, adulterers who "ran away", rapists, and men who had sex with other men or with animals risked outlawry. The same applied to people guilty of incest in the first degree, and after the decree of 1478, also to those guilty of incest in the second degree. Outlawry included confiscation of property. In this connection, the younger Christian laws use the term *fé*, property in general, and *lausir aurar* movable property, in modern Norwegian *løsøre*. The decrees of 1392 and 1478 use terms like *fé* or *goeðtz* synonymously.⁵

In post-Reformation legislation we frequently encounter the term "tap av ytterste formue", literally loss of the "utmost, widest", i.e., greatest, fortune or property. Unfortunately, terms denoting the confiscation of property, such as of the medieval *fé* or *goeðtz* or the post-Reformation "tap av ytterste formue", are imprecise and are difficult to be further elucidated. The culprit had to pay by relinquishing a certain part of his property, but there are no indications of how the amount was calculated. Was everything except land sequestered, or did culprits also lose parts of their immovable property? For the questions related to this work, these problems are less decisive and we shall limit ourselves to the suggestion that one important criterion was probably the size of the culprit's fortune.⁶ In the following, the term fine(s) shall be used

⁴ Bull, *Folk og kirke i middelalderen*, pp. 119–120.

⁵ Adulterers who ran away, NB II § 24, (*NgL*, IV, p. 174); NG § 29, (*NgL*, II, p. 322). Incest with relatives of the first degree led to forfeiture of "huærium pæiningi fear sins" NB § 22, (*NgL*, II, pp. 302–303); NG § 31, (*NgL*, II, p. 322); J § 49, (*NgL*, II, pp. 374–375); NB II § 26, (*NgL*, IV, p. 175). For homosexuality and bestiality we find "firirgiort huarium peninge fears sins" NB § 24 (*NgL*, II, p. 304); NG § 33, (*NgL*, II, p. 324); NB II § 29, (*NgL*, IV, p. 176). Rape: NG § 33, (*NgL*, II, p. 324) has outlawry (*utlægr*) or otherwise does not say anything. In addition, a decree of Magnus the Law-mender in force throughout the kingdom prescribes that obstinate adulterers were to be outlawed (*være utlege*), (*NgL*, II, p. 454). Decree of 1392 article 2 (*NgL*, 2rk, I, pp. 22–23) *fee* and *godzet*. Cf decree of 1478 (*NgL*, 2rk, II, p. 270) *goetz*. Bo Ruthström, *Land och Fæ. Strukturrellt-rättsfilologiska studier i fornordiskt lagspråk över beteckningar för egendom i allmänhet med underkategorier* (Lund: Bloms i Lund Tryckeri AB, 2003), presents a through study of the stock of words for property in the medieval Scandinavian laws. Ruthström has reconstructed the pre-medieval structure and he discusses how the various terms developed during the Middle Ages and the beginning of the Modern Age.

⁶ Terjesen, *Blodskam og leiermål*, p. 26, discusses the terms *ytterste formue* and *hovedlodd* or *boslodd*: the dowable property, i.e., the part of the property to which

to denote fixed amounts of fines for less serious sexual crimes as well as loss of property for the more serious ones. The large majority of fines for sexual crimes in the post-Reformation sixteenth century are calculated in riksdalers. In the few cases where fines were paid in for example silver or farm animals I have, where possible, calculated the value in riksdalers.

Already in 1291 fines were demanded for adultery at Trondenes in Northern Norway, but apart from the fact that the amount was high enough for Bjarne Erlingsson of Giske to take the trouble of forcing the local priest, Audun, to hand the fines over to him, we do not know whether the fines were typically high or not.⁷ Otherwise, 38 cases of adultery are documented from the Middle Ages, of which 24 were concluded by imposing fines which were in part substantial. The fact that levels of fines varied considerably and that medieval cases of adultery are few and far in between renders any attempt to calculate average amounts futile.

From the century of the Reformation 180 cases of adultery are documented, including unspecified, simple, double adultery, and adulterers who "ran away". The distinction between simple and double adultery, already documented in Bishop Thórlákr of Skálholt's late twelfth century penitential and introduced into legislation in the second half of the thirteenth century, continued as a part of legal practice in the post-Reformation sixteenth century and throughout the seventeenth century. In theory, double adultery should have entailed fines twice as high as simple adultery but it makes little sense to attempt an analysis of the possible differences within these fines. From the medieval period we have no details at all about what type of adultery had been committed and in the post-Reformation sixteenth century the majority of cases of adultery do not distinguish between the subcategories either.

The average fine demanded for adultery during post-Reformation sixteenth century was 12,5 riksdalers. The amounts paid varied considerably

a spouse (here: male or female) is entitled when the marriage ends. However, it is unclear whether there was a real differentiation between these terms, and how big the part of the possessions lost was. Cf. Bastiansen, 'Væ dig Bergen', p. 89. From the post-Reformation sixteenth century I found only one case giving such information: a man had to pay half of his dowable property as a fine for adultery. Apart from capital punishment, loss of allodial land was the most severe sentence; allodial land was usually not confiscated. Cf. L IV 1, (NgL, II, p. 48) *Magnus Lagabøters landslov*, p. 43; continued in *Kong Christian den Fjerdes norske Lovbog af 1604*, III 1, p. 39.

⁷ DN, III, no. 30, p. 29.

from case to case, the minimum being 1 riksdaler and the maximum 60 riksdalers. Terjesen and Bastiansen document that during the seventeenth century there continued to be considerable fluctuation in the amounts of the fines demanded. In seventeenth-century Bergen people paid fines as low as 2 riksdalers, while the highest fine recorded was an astonishing 210 riksdalers for simple adultery in 1609. In this case, the married woman and her unmarried lover paid 160 and 50 riksdalers, respectively.⁸ Terjesen and Bastiansen propose that fines for adultery varied according to the wealth of the implicated persons, so that there were no absolute amounts.⁹ This indeed seems to be the most convincing explanation for the fluctuations in fines also for the post-Reformation sixteenth century as well as the fluctuations which also characterise the few cases of adultery from the Middle Ages where the amount of the fine is recorded.¹⁰

We do not know whether there existed a fixed table of fines for fornication before the *Ordinance against loose living* of 1617.¹¹ This is nevertheless the only area where a certain standardisation of fines has been found. Before the Reformation, this concerned 6 out of a total of 10 cases of fornication recorded in the register of fines in the account rolls of the fiefs, mainly from Romerike for the year 1528. Four men paid a cow each, and two men paid 2.5 *lodd* silver each, which in the 1520s corresponded approximately to the value of a cow.¹²

From the post-Reformation sixteenth century 498 cases of fornication are documented. In 469 of these cases the fines are calculated either in riksdalers or in other goods and possessions that are easy to convert

⁸ Bastiansen, 'Væ dig Bergen', pp. 88–90. Terjesen, *Blodskam og leiermål*, p. 80 draws attention to an example from 1602 where two cases of simple adultery entailed fines of ½ riksdaler and 10 riksdalers respectively.

⁹ Bastiansen, 'Væ dig Bergen', p. 87; Terjesen, *Blodskam og leiermål*, p. 75.

¹⁰ This is also indicated by the fact that settlements were often reached; which shows a certain discerning understanding. People paid with farms, part of farms, rent from farms, movable property, or money. In 1503 for example, *DN*, VI, no. 635, p. 665 a man was fined 16 *kyrlag* (a *kyrlag* was an officially approved, i.e., healthy and mature, cow), which was above-average in such cases in the post-Reformation sixteenth century. In 1528, *NRJ*, IV, p. 339 a man paid 15 marks and 4 cows, another 4 cows, 3 sheep, 1 quilt, 1 bed sheet and 1 bedspread because he had ran away. Apparently, whatever movable property could be converted into cash was confiscated.

¹¹ The *Ordinance against loose living* from 1617 stipulates that if they marry each other, they shall be punished according to the *Recessen*. Those who do not marry shall likewise give a public confession, and in addition he shall pay his Master (i.e. King) 12 riksdalers and she 6 riksdalers. *Danske Kirkelove*, vol. 3, p. 62.

¹² A cow had the value of 2.5 to 3 *lodd* silver.

into money.¹³ Also here we note considerable differences between the lowest fine of half a riksdaler, and the highest of 37 riksdalers. The average was 3 riksdalers. Two-thirds of all cases ended with a fine between half a riksdaler to 3 riksdalers, and in a mere 5 percent of cases the fines were higher than 10 riksdalers.

Terjesen found that fines were also paid for fornication before the decree on fornication was issued in 1617. The level of fines for fornication was about the same whether marriage ensued or not, usually between 1 and 4 riksdalers. For the few cases where fines were substantially higher, Terjesen could show that this concerned recidivists guilty of fornication without ensuing marriage. In total, Terjesen documents 13 such cases, with fines ranging from 6 to 30 riksdalers.¹⁴ Unfortunately my sources do not give any hint to whether the few high fines for fornication included were high because the person had had long-term sexual relations, or relations with several different persons. Such an interpretation might however be supported by Terjesen's study and by Brundage's observations of medieval Europe.¹⁵ Bastiansen also argues that during the first decades after 1617 the amount of the fines was influenced by the profession and wealth of the accused men. By contrast, the amount of the fines did not depend on whether it was imposed by a court or calculated by the steward.¹⁶

One example of the increasing severity of sentences after the Reformation was supposedly the growing tendency towards physical punishments, such as whipping for fornication.¹⁷ The *Ordinance against loose living* of 1617 prescribes that those guilty of fornication without an ensuing marriage and who were not able to pay their fine were to be punished physically; women who had committed the crime of

¹³ In those cases where there is no information on fines, either the conclusion of the case is unknown, or the accused was to swear a purgatory oath later, or the accused was acquitted.

¹⁴ Terjesen, *Blodskam og leiermål*, pp. 56–57. Of these, two men were condemned to death for fornication in the third instance. Bastiansen, 'Væ dig Bergen', pp. 87–88, notes that from the mid-seventeenth century on, fornication with ensuing marriage was less heavily fined than that without. She proposes as a possible explanation the view that such relations did not attack marriage as an institution, but she only considers a very short period to discern such a trend. Terjesen, *Blodskam og leiermål*, pp. 60–61 notes for the period after 1650 that fines tend to agree with the amounts prescribed in the decree of 1617.

¹⁵ Brundage, *Law, Sex, and Christian Society*, pp. 459–462.

¹⁶ Bastiansen, 'Væ dig Bergen', pp. 95–96.

¹⁷ Næss and Österberg, 'Sanctions', p. 148.

fornication for the third time were to be whipped.¹⁸ There is however indications that some laws prescribed whipping before 1617. At Oslo town hall in 1575 it was decided that if so-called “loose women” lay with married men for the second time, they were to “lose their skins” and leave the country. Sentences of whipping were also passed in Oslo in the 1570s, before the decree was issued.¹⁹ It is therefore possible that the above-mentioned decree either confirmed already existing legal practice, or that possible older but now lost decrees were re-issued. Neither the younger Christian laws nor the decrees of 1392 and 1478 prescribe physical punishments as a subsidiary punishment if the culprit was unable to pay. By contrast, the Christian laws from the eleventh and twelfth century do, if only for slaves and semi-free persons. It is possible that over time this practice developed into customary law for poor people in general.²⁰

Outside Oslo I only found two cases of sexual crimes where whipping is mentioned, they were both fornication cases from the account rolls of Senja in Northern Norway for the year 1567. Men and women were both made to pay fines, and the women also had to “redeem her skin” (*for syn hud att løse*).²¹ The expression means that the women were to be whipped in case they did not manage to pay their fines, a principle which we find again in the ordinance on fornication of 1617.²² It is difficult to find a legal basis for whipping as a subsidiary punishment in the cases from 1567. It may simply have been customary, but it is also not impossible that earlier decrees have been lost. Also other studies on sexual crimes have relatively little documentation that people were punished by whipping. Out of 1345 cases of fornication from Rogaland in the period 1602–1661 Terjesen only has information concerning 2 women who were whipped, and both of these had sexual relations with two men.²³ It is also possible that it was not common to include information about whipping in legal documents. As Bastiansen shows, it was not the primary function of the account rolls to document physical punishments.²⁴ Bastiansen also refers to Absalon Pederssøn, who

¹⁸ *Danske Kirkelove*, vol. 3, p. 62.

¹⁹ *Nils Stubs*, pp. 90, 156, 158.

²⁰ See the discussion on *landsvist* above in chapter 4.

²¹ *NLR*, V, p. 233. Peder Olsen and Anne Simensdatter, and Oluf Bertilsen and Ingri Mogensdatter. The former couple paid 1 riksdaler and ½ riksdaler respectively, the latter couple 3 riksdalers and 1.5 riksdalers.

²² *Danske Kirkelove*, vol. 3, p. 62.

²³ Terjesen, *Blodskam og leiermål*, pp. 56–57.

²⁴ Bastiansen, ‘Væ dig Bergen’, p. 92.

notes in an entry in his diary of 1568 that Bergen got a new whipping post that year: “Bleff opsat oc bygd den nye kag”, an observation which implies that there had also existed a whipping post in Bergen before 1568.²⁵ In her sources, Bastiansen is only able to document whipping for the first time in the seventeenth century: 6 women in the period 1628–1659 and 5 women in the 1660s.²⁶ At that time, sentences of whipping were frequently passed together with banishment. Bastiansen’s study on extra-marital sexuality in Bergen also includes prostitution, and her analysis of seventeenth-century legal practice indicates that prostitutes were more likely to suffer whipping and banishment than other women sentenced for sexual crimes.²⁷

Of the 19 cases of incest documented from the Middle Ages, only 9 yield information about the fines. Consequently their scattered occurrence in terms of time and space renders attempts to calculate average fines meaningless. Of the 43 cases of incest from the post-Reformation sixteenth century 27 document the payment of fines (see table below).

Table 3. Size of Fines for Incest, by Degree of Kinship

Degree of kinship	Total no. of cases	Cases with information on fines	Average fine per case
1st degree	17	6	54
2nd degree	8	6	39
3rd degree	10	9	33
Unknown and 4th degree	8	6	12,5

As the table shows, fines were also paid for incest with relatives of the fourth degree (one case). Since the definition of incest was narrowed down from fourth degree in the medieval period to third degree after the Reformation, the question of kinship should not have arisen anymore in these cases. Yet, incest with relatives of the fourth degree continued to play a role in sentences in some parts of the country as late as the second half of the seventeenth century. Natvik has shown that fines were collected for incest with relatives of the fourth degree

²⁵ Bastiansen, ‘Væ dig Bergen’, p. 92; *Absalon Pederssøns dagbog*, p. 142.

²⁶ Bastiansen, ‘Væ dig Bergen’, pp. 90–93.

²⁷ Bastiansen, ‘Væ dig Bergen’, pp. 63–64.

in Sogn, Western Norway, in the 1660s, with fines slightly lower than for incest in the third degree.²⁸

Apart from the least serious category of incest, where average fines equal those for adultery, fines for incest are far higher than for adultery. Terjesen notes the same tendency. She finds that second cousins had to pay just below 30 riksdalers on average, while the fines for adultery were approximately half as much.²⁹ This also supports the notion that “loss of the utmost property” was an elastic formulation which did not merely refer to the culprit’s ability to pay but also that incest was considered more serious than simple adultery. In addition, forced labour seems to have occurred in cases of incest. The protocols of Oslo lawthing from 1572 list some serious cases of incest where the culprit was sentenced to work at the castle (*på slottet*), presumably Akershus Castle.³⁰ I did not find any evidence of forced labour in connection with incest or other sexual crimes in either medieval or post-Reformation legislation. The decrees from the second half of the seventeenth century prescribing forced labour for those guilty of incest with relatives of the first or second degree, to which Næss refers, may represent confirmation of an already existing legal practice. Terjesen finds that such sentences were passed for these crimes in the seventeenth century.³¹

In the previous chapter we saw that rape could lead to a death sentence; here we add that the alternative was a very high fine. In one rape case from the medieval period the documented fine is 30 marks, and in another case the whole property may have been confiscated.³² Of the rape cases from the post-Reformation sixteenth century merely two of them note fines, in both cases 20 riksdalers.³³ Ten cases of unspecified sexual crimes are documented from the Middle Ages and some

²⁸ Oddvar Natvik, ‘Brotsatferd i Sogn og Sunnfjord på 1600-talet: Brotsstrukturar i dei to bygdelaga ut frå sakfalls-listene’ (unpublished dissertation, hovedoppgave, University of Oslo, 1989), pp. 129, 133.

²⁹ Terjesen, *Blodskam og leiermål*, p. 125. Adultery is “adultery in the first instance” in Terjesen’s study. She compares fines for adultery and incest which per definition should not entail capital punishment, but was according to the law to lead to confiscation of *ytterste formue*.

³⁰ Nils Stubs, p. 8.

³¹ Næss, ‘Trolldomsprosessene’, p. 53; Terjesen, *Blodskam og leiermål*, pp. 25–26, 117.

³² In a fragment of an account roll thirty marks silver in fines to the king are recorded in 1499. DN, XIII, no. 163, p. 141, and in a case from 1502, where the culprits were also accused of murder; “life and property” may have been lost: (*dømde theris alle liff oc gotz i kongens wære*). DN, V, no. 992, pp. 714–715.

³³ NLR, IV, p. 21; Absalon Pederssøns dagbog, p. 138.

of them note payments of large fines and possibly even full confiscation of property. There are also ten cases of unspecified sexual crimes documented from the post-Reformation sixteenth century and in each case high fines had to be paid. The lowest and highest fines were 10 and 70 riksdalers respectively, with an average of 29 riksdalers for the nine cases where the fines were recorded.

This chapter has shown that the same categories of sexual crimes were punished by fines both during the Middle Ages and after the Reformation. Although only a small number of medieval sources report how the cases were resolved, it is nevertheless possible to assert that fines for fornication were far lower than those for adultery and incest. My calculations for the post-Reformation sixteenth century show gradually increasing fines for the categories of fornication, adultery and incest. These findings are supported by corresponding studies about the seventeenth century. Regarding fornication and adultery a few of the fines were far higher than the average.³⁴ The most convincing explanation is that the culprit either had a long-term relationship which he or she was unwilling to end, or that he or she had sexual relations with several persons. In the post-Reformation sixteenth century, as in the seventeenth century, the average fine for incest was far higher than the fine for adultery. This indicates that "loss of the utmost property" was an elastic term. The below-average fines were probably due to the offenders' relative poverty.

Also in cases where capital punishment would have been authorised, economic sanctions were obviously an option. In addition, the forbidden aspects of sexuality were subject to yet another form of public penalty: penance, which after the Reformation was continued to a large degree via the Church discipline.

³⁴ However, even between different higher- and lower-ranking categories there may be exceptions from the rule. Some account rolls for example list fines for adultery which are lower than some of those for fornication. In *NLR*, I, p. 72 for Odalen year 1557 2 cases of fornication with virgins, *mørett*, (entailing fines of 5 dalers, and 6 dalers and a cow, respectively) and 3 cases of fornication (2 of them entailing fines of ½ riksdalers each, the third a much higher fine, 6 riksdalers) are recorded. For Eidskog for the same year 2 cases of adultery are noted, where in each case a fine of only one cow was paid. In Solør one cow for *mørett*, 1 riksdaler for fornication, a solid 17 riksdalers for *skjørlevnet*, 15 riksdalers for adultery and another 8 riksdalers for fornication were paid. Also this pattern appears again in the seventeenth century.

CHAPTER SIX

FROM PENANCE TO CHURCH DISCIPLINE

Having discussed the criminal aspect of forbidden sexuality, we shall now examine how the moral predicament of such acts—sin—was addressed through medieval penance and post-Reformation Church discipline. Also here we find some evidence for continuity.

Regarding the Middle Ages, a comparison of penitentials and Christian laws shows a high level of agreement in the degrees of sinful or criminal acts and the accompanying penance or punishment. The penitentials of Bishop Thórlákr and Archbishop Henrik Kalteisen for example prescribe the greatest penance for bestiality, homosexuality and incest with relatives of the first degree, and the least penance for sexual relations between two unmarried persons.¹ The penance for incest depended on the degree of kinship, a principle which is mirrored in the gradation of fines in the younger Christian laws. The penance for simple adultery was smaller than the penance for double adultery, a rule taken up in the *Young Christian Law of the Borgarthing* which states that in the latter case both the penance and the fine payable to the bishop was to be doubled.² In addition, the penitentials and the Christian laws agree that obstinacy and recidivism were aggravations. This is clear by general formulations in the penitentials and by the more

¹ Bull, *Folk og kirke i middelalderen*, pp. 119–120 and 152–153 gives an overview of the contents of Bishop Thórlákr and Archbishop Kalteisen's penitentials. Thórlákr's penitential prescribes 9 or 10 years' penance for sodomy and bestiality, which includes fasting, genuflection, prayer, whipping and exclusion from communion for the first three years. For public double adultery 8 years' penance is prescribed and a little less when it is secret; penance for single adultery is 7 years. For incest there is between 3 and 9 years' penance, depending on the degree of kinship. For sexual relations between unrelated people 3 years and because both single and double adultery and incest are named specifically this must be penance for fornication. Kalteisen's penitential prescribes 15 years penance for incest amongst relatives of the first degree, bestiality and homosexuality. Incest amongst relatives of the third degree and double adultery are given 9 years, simple adultery 7 years and incest in the fourth degree 6 years.

² NB II § 22, (NgL, IV, p. 173).

severe punishments in the Christian laws in cases where the culprit did not accept guidance or repeated the offence.³

Although there were a certain correlation between penance and punishment, I am not convinced that a possible theological development concerning the views on sin and penance finds its one-to-one equivalent in the punishments prescribed by law.⁴ In their studies on, respectively, alms and people's ideas about hell during the period 1100–1300 Gerd Kristin Høivik and Gro Svennebye argue that the teachings of the Church concerning hell and the possibility of atoning for one's sins became accepted by the populace during the second half of the thirteenth century. Consequently, fines for sins committed during one's earthly life could be reduced. Their conclusions are based on a comparison of the levels of fines for the same offences in the old Christian laws of the *Frostathing* and the *Gulathing* with *Archbishop Jon's Christian Law* of 1273.⁵ *Archbishop Jon's Christian Law* is exceptional because the fines for any given offence are usually far lower than those stated in the Christian laws to which they are compared. It is however relevant to ask why this reduction of fines only appears in *Archbishop Jon's Christian Law*, but not in the almost contemporary younger Christian laws.

Charles Joys for example considers this special characteristic of *Archbishop Jon's Christian Law* as a sign of the Church's autonomy.⁶ It is however difficult to comprehend why Church autonomy would have been exercised in such a way as to ensure a lower income, the logical consequence of reduced fines. Why and how a work such as *Archbishop Jon's Christian Law* ended up containing different levels of fines can also be explained with a glance at the decrees enjoining lower fines in the secular laws. Kings Håkon Håkonsson and Magnus the Law-mender decreed that the kingdom's fines were to be reduced to a third and a fourth of the previous levels. Fr. Brandt has shown

³ Rafnsson, 'The Penitential of St. Torlakur', p. 25.

⁴ A problem I have discussed earlier in Riisøy, *Stat og kirke*, pp. 128–129.

⁵ Gerd Kristin Høivik, 'Almisser: ein studie av ulike motiv for å overføra ressursar til fattige' (unpublished dissertation (hovedoppgave), University of Bergen, 1997), p. 41; Gro Svennebye, 'Helvetes kvaler og himmelsk salighet: En studie av forestillinger omkring helvete og himmelriket i Norge i perioden ca. 1100–1300' (unpublished dissertation (hovedoppgave), University of Oslo, 1999), pp. 87, 94.

⁶ C. Joys, 'Tidsrommet 1253–1280', in *Nidaros erkebispesetol og bispesete 1153–1953*, ed. by Arne Fjellbu and Bernt C. Lange (Oslo: Land og kirke, 1955), p. 305.

that these reductions were, if inconsistently, included in the *Landslaw*.⁷ When a royal decree in 1316 stipulated that fines in the Christian laws were to be reduced by a third, this practice of regulating fines in the existing legislation was therefore not new.⁸ Just as in the *Landslaw*, the reduction of fines in the extant manuscripts of *Archbishop Jon's Christian Law* is equally unsystematic from copy to copy. This is for example illustrated in an extract of § 47 on incest. Second cousins were to pay a fine of 10 oras, apart from the version of manuscript E which cites 8 oras, while the contemporary younger Christian laws all cite 24 oras, or rather 3 marks.⁹

The earliest manuscripts of *Archbishop Jon's Christian Law* date from the first half of the fourteenth century. For this reason, we cannot be sure about the exact formulation in the original from 1273.¹⁰ It is important to keep this methodological point in the back of our mind, since it is possible that fines in the original version of *Archbishop Jon's Christian Law* were not reduced in comparison to other Christian laws. If *Archbishop Jon's Christian Law* had originally contained reduced fines one would assume that their levels would be more uniform in later copies of the law. Different manuscripts of *Archbishop Jon's Christian Law* with varying fines for one and the same offence rather point towards a process whereby later decrees about reducing fines were accepted and incorporated into the text as best the copyist could. Hence, as an alternative to the explanation presented above, I propose a more prosaic interpretation of the reasons for the reduced fines in *Archbishop Jon's Christian Law*: the Crown's influence. After all, the decree of 1316 was issued during a period of serious conflict between Crown and Church, when both powers were keen to define their respective jurisdiction in the field of Christian laws.

⁷ King Håkon Håkonsson reduced fines to the Crown to a third, L X I–1, (*NgL*, II, p. 175), *Magnus Lagabøters landslov*, p. 191. This reduction was partially continued by Magnus the Law-mender, down to a quarter of the previous level, L X 2–1, (*NgL*, II, p. 176), *Magnus Lagabøters landslov*, pp. 192–193. Fr. Brandt, *Forelæsninger over den norske retshistorie vol. II*. (Kristiania: Damm, 1883), pp. 25–26 shows that in some regulations in the *Landslaw* fines had been reduced by a third, in others by a quarter. Apparently, during the incorporation of the new levels the calculation of fines was not quite consistent.

⁸ *NgL*, III, p. 117: “oll su sekt...falle til briidunghs fallz”.

⁹ According to J § 47, incest between relatives of the second degree was to entail a fine of 12 oras, while the younger Christian laws stipulate a fine three times higher, 4.5 marks = 36 oras (one ora equals one eighth of a mark). *NgL*, II, pp. 372–373.

¹⁰ See *NgL*, II, p. 340 for the dating of the different manuscripts.

With the exception of some individual cases noted by Bull, there is no documentation on the practical administration of medieval confession and penance in Norway.¹¹ Somewhat more information exists about post-Reformation Church discipline, although a comprehensive study during the century of the Reformation is also lacking. Bull takes a break at the Reformation for granted.¹² Bergan distinguishes between official views on confession, which did change with the Reformation and the Roman Catholic practice of confession, which he assumes to have continued in most places to a certain extent during the century of the Reformation.¹³ This hypothesis seems quite convincing; after all, the catholic priests remained in office to a large degree.¹⁴

Bergan finds examples which show that the church decrees were observed from the late sixteenth century onwards. The protocols of the chapter of Stavanger Cathedral from the late sixteenth century contain several entries of public confession, some of which were because of adultery.¹⁵ Based on a large number of examples particularly from seventeenth-century church records, Bergan concludes that most confessions were ordered because of fornication (in fact, two-thirds of all confessions) and adultery.¹⁶ Studies on sexual crimes during the seventeenth century also discuss the use of Church discipline. However, similar to my own findings, the little information that can be found on Church discipline comes from the judicial records.¹⁷

¹¹ Torstein Jørgensen and Gastone Saletnich have discussed and translated letters from the Archbishopric of Nidaros which have survived in the penitential archives in Rome. Amongst other the letters refer to people who had committed such grave sins that they required an absolution from the pope. Torstein Jørgensen and Gastone Saletnich, *Brev til paven: Norske forbindelser med Den hellige stol i senmiddelalderen* (Stavanger: Misjonshøgskolens forlag, 1999); Torstein Jørgensen and Gastone Saletnich, *Synder og pavemakt: Botsbrev fra den Norske kirkeprovins og Suderøyene til pavestolen 1438–1531* (Stavanger: Misjonshøgskolens forlag, 2004).

¹² Bull, *Folk og kirke i middelalderen*, p. 104.

¹³ Bergan, *Skriftemål og skriftestol*, p. 29.

¹⁴ When the Reformation was introduced in Norway, King Christian III stressed that Catholic priests should be allowed to continue so that the “poor, simple and uneducated people” should not be worried and disturbed. Lausten, “The early Reformation”, p. 33.

¹⁵ Bergan, *Skriftemål og skriftestol*, p. 41. Amongst other Erik of Omøen was in 1578 sentenced to public confession together with his housekeeper, because they had an adulterous relation while Erik’s sick wife was still alive.

¹⁶ Bergan, *Skriftemål og skriftestol*, pp. 42, 47–53.

¹⁷ Bastiansen’s material does also not contain any information on confessions for people guilty of fornication in Bergen, Bastiansen, ‘Væ dig Bergen’, p. 31. Also incest was to be punished by public confession, of which Terjesen, *Blodskam og leiermål*, p. 126 has found some few examples. Examples exist from after 1652 that public

According to Bergan, Church discipline was incorporated into legislation during the seventeenth century, with the result that secular legal authorities became more and more involved in these traditionally ecclesiastical matters. In addition, secular courts began sentencing people to public confession. New elements of coercion, admonition and command linked to public confession in church bear witness—claims Bergan—to a tightening of Church discipline. Bergan underlines that this process can also be seen as a return to the medieval system of penance.¹⁸ Yet such practices can be traced back to already before the start of the seventeenth century. Nils Stub's protocols contain some information indicating that the lawthing's sentences also included Church discipline for criminals. As punishment for his loose life in 1575, a man had to be absolved in public by his parish priest in the parish church "tage obenbarre afflosning aff hans sogneprest hieme j hans sognekirke" and a woman who had committed adultery with a married man for three years was to make a public confession "tage obenbarlig skriff(t) bode" in addition to being whipped.¹⁹ In my sources there is almost no information about Church discipline. There is some evidence to show that in the post-Reformation sixteenth century a certain connection existed between Church discipline and punishment and that sentences passed by one and the same legal authority could contain both parts.

Also in the Middle Ages there was a relationship between penance and punishments meted out by secular authorities. The institution *landsvist* is a good example of this. In a case of incest from the early 1380s a step-father who had had sexual relations with his step-daughter not only had to pay ten marks to the king; he also had to submit to Church discipline in order to obtain a letter of *landsvist*. He had to show his desire to be reconciled with God, (*bøte wider Gud*) so that the king would grant him his life.²⁰ The requirement to make amends with the church through penance is found in all letters of *landsvist* concerning manslaughter.

confession formed part of court sentences; at least it was mentioned together with other punishments. According to Birger Kirkeby, 'Soldater og leiermål på 1600-tallet', *Historisk Tidsskrift* [Norway] 81 (2002), pp. 414–415 it seems that only a minority of cases of fornication involved confession. Telste, *Mellom liv og lov*, p. 84 notes that public confession is only rarely mentioned in the courts' judgements.

¹⁸ Bergan, *Skriftemål og skriftestol*, p. 48.

¹⁹ Nils Stub, p. 87.

²⁰ DN, XXI, no. 171, p. 133 [the diploma dates between 1383–1384].

CHAPTER SEVEN

THE REWARD OF SIN

Until now, we discussed whether the level of punishments for sexual crimes was raised after the Reformation. I argue against the traditionally held view of a break, underlining instead the general continuity in the legal situation between the Middle Ages and the period after the Reformation in regards to capital punishment, fines and the Church's guidance through penance and Church discipline.

Yet the Reformation did bring some changes. This is most apparent in the fact that legislation against sexual crimes after the Reformation expressly prescribes the death penalty and includes details about how the condemned was to be executed. This concerns the legislation on adultery from 1539 and later, the legislation on men's sexual relations with several respectable women from 1589, legislation on incest (with relatives of the first or second degree) in the period 1610–1637, on incest (with relatives of the first degree) in the period 1637–1687, and legislation on homosexuality and bestiality in 1687.

I argue that the distinction between medieval outlawry and post-Reformation capital punishment is small. A person sentenced to outlawry for serious sexual crimes could obtain a measure of the king's mercy, via the institution *landsvist*. Yet if the king refused the plea, the culprit could be punished by the king's ombudsmen. This punishment could be either a serious physical mutilation or indeed an execution. In other words, this was intended to give justice while at the same time stopping people from taking the law into their own hands. The medieval institutions outlawry and *landsvist* enjoyed a long life in Norwegian legislation. From the post-Reformation sixteenth century there are still examples where rapists, adulterers who ran away, and people guilty of incest were either sentenced to outlawry or at least called outlaws. In a general overview on punishments in Scandinavia, Henrik Stevnsborg and Ditlev Tamm argue that the medieval legal term outlawry only began to disappear towards the end of the seventeenth century.¹ Norwegian

¹ Stevnsborg and Tamm, 'Punishment', p. 86.

research supports this view. According to Imsen and Winge, letters of *landsvist*, formally unchanged from the beginning of the fourteenth century, were issued until the first decades of the seventeenth century.² Terjesen notes examples showing that outlawry was a possible punishment for incest and adultery in Rogaland during the first half of the seventeenth century.³ In Telste's cases of rape only one sentence was passed and in that case the culprit was sentenced to outlawry in 1669.⁴ And Frode Brenden Reime documents that in Upper Hallingdal, a remote and mountainous area in southern Norway, criminals lived as outlaws as late as the first half of the eighteenth century.⁵

Outlawry also implied that the condemned was excluded from society. One may ask whether in fact this was a harsher punishment than being executed immediately. An outlaw was not merely geographically removed from his community; he or she also lived in constant fear of being killed by anyone at any time. He or she was cut off from friends, family and human society, as well as the religious sphere. "det var berre gjennom medlemskap i ei sosial gruppe at ein person kunne eksistera i samfunnet"⁶ [It was only through membership in a social group that a person could exist in society], says Gunnhild Vatne Ersland, who in her study on outlaws in the High Middle Ages explains why exclusion from society was such a severe punishment.

The *Landslaw* also connects the punishment of the culprit to the purging of the country. It is possible to discern a certain continuity in the fear that God might punish human society if the sinner was not sentenced and if the traces of the sinful act did not disappear. This is the likely explanation for the sometimes brutal executions which included burning at the stake, the purging punishment par excellence, which took place also before the seventeenth-century. It also contributes to the view proposed here that there was continuity in such brutal punishments in Norway. The principle of equivalence, which aimed at re-establishing

² *Norsk historisk leksikon*, p. 466.

³ Terjesen, *Blodskam og leiermål*, pp. 76–77, 119–120.

⁴ Telste, *Mellom liv og lov*, p. 190.

⁵ Frode Brenden Reime, "Hallingdølenes knivblad satt løst i hans slir": en undersøkelse av drapssakene i Ål prestegjeld på 1700-tallet i et kriminalitets- og kulturhistorisk perspektiv' (unpublished dissertation (hovedoppgave), University of Oslo, 2000), pp. 138–147. Some of these had been condemned to death for murder already in the late 1600s, but lived in the mountains as outlaws still in the beginning of the 1700s.

⁶ Gunnhild Vatne Ersland, "...til død og fredløshed...": fredløysas innhald og funksjon på Island frå 1117 til 1264' (unpublished dissertation (hovedoppgave), University of Oslo, 2001), p. 27.

the social balance by removing unclean elements, characterise the sentencing of the most reprehensible sexual crimes during the Middle Ages as well as after the Reformation. At the same time it is important to highlight the continuity regarding considerations of adequacy from the High Medieval to the Early Modern period.

After the Reformation, just as during the Middle Ages, obstinacy and recidivism were aggravating circumstances leading to stricter punishments in legislation as well as in legal practice. Already in the early years of Christian III's reign, in 1539, capital punishment was prescribed for adultery in the third instance.⁷ To a certain extent this parallels Håkon Håkonsson's and Magnus the Law-mender's legislation on adultery. Also at this time, fines were the usual punishment but obstinate offenders were to be declared outlaws. According to the decree on marriage of 1589, men who had sexual relations with so-called respectable women—virgins and widows—risked the death penalty or another undefined "serious punishment" only when they repeated the offence.⁸ As already mentioned, a letter written to the lord of Akershus, Axel Gyldenstjerne, in 1592, emphasises that capital punishment for incest with relatives of the second and third degree was to be limited to recidivists.

In addition, there was a differentiation within capital punishment. Different forms of execution existed, for example beheading and burning at the stake. In the worst case the executed was denied a Christian burial, in which case the death penalty influenced eternal life, or rather prevented it. The principle that outlaws, amongst them those who had committed serious sexual crimes, could be excluded from the churchyard is expressed in the medieval Christian laws and this principle obviously continued to be in force after the Reformation. Concerning fines for sexual crimes, I have shown that they were incurred for the same categories of forbidden sexual acts both before and after the Reformation. Since fines were the most common type of sanction, great continuity characterises the pattern of punishments for sexual crimes throughout the Middle Ages, the post-Reformation sixteenth century, and the seventeenth century.

⁷ This regulation is based on medieval Danish town legislation, as discussed in Part A.

⁸ *Lover og forordninger 1537–1605*, p. 220. See also a similar rule in later legislation; *Kong Christian den Femtes Norske Lov: 15de april 1687*, 6–13–8, p. 254.

We also discussed how penance (in the Middle Ages) and Church discipline (after the Reformation) were administered in the sphere of sexual crimes. There are certain similarities with regard to legislation and application of penance/Church discipline before and after the Reformation. The regulations concerning penance were part of the Christian laws and during the seventeenth century those regarding Church discipline were included in the legislation. The continuity is also documented by the fact that there was a certain interaction between the Church's penance/Church discipline, and the punishment handed out by the secular authorities.

From the mid-thirteenth century until the *Norwegian Law* of 1687 punishment of sexual crimes is first and foremost characterised by aspects of continuity. I therefore argue that high medieval views on punishment survived until the Enlightenment.⁹ Also Norwegian scholars consider the mitigation of sentences a consequence of new ideas about human dignity and equality which surfaced during the Age of Enlightenment.¹⁰ Contrary to these latter views however, I do not subscribe to a connection between harsher sentences and the Reformation. Severe punishments for sexual crimes had already been decreed by the high medieval persecuting Crown.

The decline in the severity of sentences was gradual. Capital punishment was limited to "mere" physical suffering by the decree on executions of 1737. Criminals who had been beheaded by means of the axe or the sword no longer risked being later cut up into separate parts and buried in separate places, but their physical remains were buried together.¹¹ The extensive regulations on incest were repealed in 1800 and the punishment for fornication in the first and second instance was

⁹ (Age of) Enlightenment is the common expression used for eighteenth-century Europe, more precisely, usually for the period between the English Glorious Revolution in 1688 and the French Revolution in 1789.

¹⁰ General discussion Sunde, *Speculum legale*, pp. 250–252; Ditlev Tamm et al., 'The Law and the Judicial System', in *People Meet the Law*, pp. 33–34 Næss and Österberg, 'Sanctions', p. 160, discussion of fornication; Sandvik, 'Tidlig moderne', pp. 120–121 and Sogner, Lindstedt Cronberg and Sandvik, 'Women in Court', pp. 193–194.

¹¹ Sunde, *Speculum legale*, pp. 251–252. Criminals sentenced to lose their head by the sword were to be buried in the churchyard without ceremony, while those sentenced to lose their head by the axe and to have their head displayed on a stake were to be buried at the place of execution, according to the decree on executions of 1737.

abolished in 1812.¹² In 1815, all physical punishments were abolished.¹³ The Enlightenment also brought growing opposition to public confessions and they were gradually suppressed. As Bergan points out, such types of public punishment did not agree with the period's optimistic belief in human nature. Public confession was abolished in regards to fornication in 1767 and altogether in 1842.¹⁴

Apparently milder sentences were gradually handed down by the courts. Næss lists numerous examples of death sentences in southern Norway (Ryfylke/Karmsund, Jæren and Dalane) during the period 1610–1660, of which 59 were due to incest, 17 to “loose living” (*løslevnet*), and 1 adultery and 1 bestiality.¹⁵ Admittedly, death sentences were not pronounced evenly throughout the period; the years 1620–1640 witnessed a particular peak. Næss' conclusion that the number of death sentences, including those for sexual crimes, decreased markedly after 1640, seems well documented.¹⁶ This view is supported by the development Terjesen discerns regarding death penalties for incest.¹⁷ According to Næss, the number of death sentences declined even further during the 1690s.¹⁸ In Telste's study on Ringerike and Hallingdal the source material is too thin to allow us to draw firm conclusions about the development of the death penalty towards the end of the seventeenth century.¹⁹ Telste concludes that the death penalty was frequently seen

¹² Sogner, Lindstedt Cronberg and Sandvik, 'Women in Court', p. 193; Sunde, *Speculum legale*, p. 252.

¹³ Sunde, *Speculum legale*, p. 252. The death penalty in times of peace was abolished in 1902.

¹⁴ Bergan, *Skriftemål og skriftestol*, pp. 54–56.

¹⁵ Næss, 'Forbrytelse og straff', p. 34.

¹⁶ Næss, 'Forbrytelse og straff', p. 36.

¹⁷ Terjesen, *Blodskam og leiermål*, pp. 113–114, 116 has 13 nephews and nieces sentenced to death during the years 1610–1637, but no examples of death sentences in such cases after 1637.

¹⁸ Næss, 'Forbrytelse og straff', p. 36. Imsen and Winge in *Norsk historisk leksikon*, pp. 429–430 describe a gradual mitigation of punishments. The death penalty for thieves was abolished in 1690. Regarding incest and clandestine childbirth, during the 1720s and 1730s legal practice was less severe than legislation which prescribed capital punishment.

¹⁹ Telste, *Mellom liv og lov*, pp. 186–188, 194–197, whose starting-point are the witch trials where sentences became much less severe after 1670, examines whether she is able to trace the same pattern for sexual crimes. Telste finds that there were so few sexual crimes warranting capital punishment in Ringerike and Hallingdal after 1670 that it is difficult to show any possible changes. For the whole period, Telste lists a total of 26 cases warranting the death penalty, but only six led to a judgement. The cases concerned one each of the following categories: third repetition of a crime; rape (the culprit was outlawed); sexual violence within marriage; repeated adultery; abduction

as an over-reaction, both by the authorities and the local communities. She discerns a tendency that the sentences of death or outlawry were only passed in cases of rape, and of repeated adultery and fornication if these crimes were combined with other violent behaviour.²⁰ Yet if Næss' conclusions were in fact part of a country-wide tendency, it would be logical that Telste's examination, which only covers the period after the mid-seventeenth century, would find relatively few death sentences. The only two specialised studies on bestiality and homosexuality, by Halvorsen Aarset and Viskum respectively, discuss legal practice after the promulgation of the *Norwegian Law* of 1687. Since Halvorsen Aarset limits herself to legal practice from the nineteenth century, her study is less relevant here. Viskum discerns a gradual decline in the use of the death penalty for bestiality in the 1720s. A temporary reversal of this development occurred in the 1730s, when Christian VI adopted a harder line. The last execution documented in Viskum's study took place in 1757.²¹ The absence of studies about the legal practice concerning bestiality before 1687 renders it difficult to gauge to what an extent there was a tendency to limit the death penalty for bestiality later, that is, only approximately a century after that for other sexual crimes.

At least in parts of the country, relatively hard sentences for sexual crimes seem to have reached a peak during the period 1620–1640.²² For Norway, it would be difficult and extremely time-consuming to attempt to trace patterns before the seventeenth century. Consequently, it is problematic to judge whether Næss' interpretation points to a real rise in death penalties after 1600 or whether the increase is merely in absolute numbers, which for the most part can be attributed to the enormous increase in extant sources for the seventeenth century and the population increase during this period. It is relevant to note that Jørn Sandnes questions Næss' claim about a drastic increase in crime

of another man's wife; sodomy. Telste has only one case of incest between such close relatives that it might entail capital punishment discussed at the *thing*, and the accused was acquitted. The last execution for witchcraft in Norway took place in 1695 according to Gunnar Knutsen, 'Trolldomsprosessenes opphør i Skandinavia' *Historisk Tidsskrift* [Norway] 84 (2005), p. 598.

²⁰ Telste, *Mellom liv og lov*, p. 196.

²¹ Viskum, 'Fortielse og straff', p. 106.

²² Næss, 'Forbrytelse og straff', p. 36 (figure 4); Terjesen, *Blodskam og leiermål*, pp. 113–114, 116.

in the first half of the 1600s; a claim which Næss has based upon an increase of fines.²³

Precisely because of this explosion in the numbers of sources from the period, Næss' conclusions concerning the decline of the death penalty rest on a far safer ground than proposals of an increase.²⁴ As discussed above, a question regarding the punishment for incest was raised in a letter to the lord of Akershus in 1592. The letter informs us that it was not uncommon that death sentences were passed in cases of incest between relatives of the second and third degree and recommends that in these cases the death penalty should only be meted out to recidivists. Yet from the post-Reformation sixteenth century only a few cases are known where death sentences were passed for incest, all of them involving relatives of the first degree. This indicates that there were a considerable number of sexual crimes dating from before the seventeenth century that entailed the death penalty and which now are lost. These methodological points made in connection to capital punishment can equally be applied to sexual crimes which led to fines.

Also if we look at other eras of crime this conclusion seems valid. In the wake of my doctoral defence, a debate on the chronological development of the death penalty arose between Hilde Sandvik and myself. Sandvik argues that the seventeenth century represents a break compared with the period before, in that death penalties were introduced in law and applied in practice.²⁵ She cites other areas of

²³ Jørn Sandnes, *Kniven, ølet og æren: Kriminalitet og samfunn i Norge på 1500- og 1600-tallet* (Oslo: Universitetsforlaget, 1990), pp. 57–61. The construction of numbers of crimes for the sixteenth century is based upon the lists of fines from the fiefs, and in particular the construction of fines regarding sexual crimes is highly uncertain; zealous priests and deans could make a great difference. Næss has compared the total amount of fines from Akershus fief from 1577/78 and 1588–92 with some intervals from the seventeenth century, beginning to end. Sandnes has taken a closer look at the list of fines from Akershus from 1560 which show considerably higher fines (approximately four times higher during a 5 year interval than Næss' figures). When other studies are included, Sandnes concludes that the number of cases and the level of fines around 1560 were on level with, or possibly slightly below, the 1620s. However, according to Sandnes, the slight increase from around 1560 to the 1620s is more than accounted for by the population increase during this time, as well as this being a period which witnessed better bookkeeping and tighter control.

²⁴ Regarding the fall in crime during the seventeenth century, based on the level of fines, is according to Sandnes, *Kniven, ølet og æren*, p. 59 well documented. (Regarding fines there is a gradual decrease from a peak in 1611–1616 to 1652–57, and a further decrease to the period 1691–1695).

²⁵ Hilde Sandvik, 'Reformasjonen—ingen betydning for lov og rettspraksis i seksualsaker?' *Heimen*, 43 (2006), pp. 53–58 and Anne Irene Riisøy, 'Kontinuitet i

crime like infanticide, theft and murder to support her view. A law on infanticide from 1635 is, according to Sandvik, one example of the introduction of “new” seventeenth century legislation which entailed the death penalty. Yet again, I argue that law and legal practice are older. Regarding legal practice, I have confined myself to one source to refute Sandvik’s claim, Nils Stubs protocol from Oslo lawthing. Here I found two women who were sentenced to death and two women who were declared outlaws according to the *Book of Personal Rights* in the *Landslaw*.²⁶ The *Book of Personal Rights* distinguishes between manslaughter (which it was possible to atone for) and murder (which led to irredeemable outlawry).²⁷

The murder-term is explicitly linked to three of these four women. The killing of newborns was classified as vile murder even before the *Landslaw*, and most probably connected to the notion that the murdered child not only lost its life on earth, but eternal life as well.²⁸ This was more serious than murder, which again was more serious than

sexkriminalisering før og etter reformasjonen. Tilsvær til Hilde Sandvik’ *Heimen*, 43 (2006), pp. 58–62.

²⁶ *Nils Stubs*, p. 159 Randi; probably the same Randi as mentioned on p. 161 and Ingrid p. 179. In 1572 and 1578 Syrid p. 20 and Ragnhild p. 182 were declared irredeemable outlaws according to the *Landslaw*, the *Book of Personal Rights*, third chapter. Syrid had “killed” her child, the murder-term, which indicates a more reprehensible kind of killing, is applied to the other three women.

²⁷ According to L IV 1, (NgL, II, p. 48), if a man kills *uegr* another person, the killer has forfeited all his property except his real estate, (*iordum sinum*). According to L IV 3.4 no one can forfeit his real estate unless he commits a vile murder, (*niðings uigh*), or commits the deeds of a niding. Vile murders are further specified in L IV 3.5, and amongst others it is a “niðings uig” if a man murders a person, (*ef maðr myrðir mann*) (NgL II, pp. 50–51), *Magnus Lagaboters landslov*, pp. 43–45. *Morð*, which is cognate with the English ‘murder’, was more reprehensible killing than that designated by the alternative term *víg*, which is reflected in the paragraphs above. If the killer concealed the deed and did not publish what he had done as soon as possible he had committed a *morð*, thus he had also forfeited his legal immunity. See references in NgL, V, 452–453, *morð*.

²⁸ According to § 22 in the *Magnustext* in the *Old Christian Law of the Gulathing*, NgL, I, p. 13 this is called murder in the highest degree (*morðet micla*), *The Earliest Norwegian Laws*, p. 50. Regarding this rule, Robberstad, *Gulatingslovi*, p. 35, refers to version I of the *Old Christian Law of the Borgarthing*, § 3, which states that a heathen murder is worse than a Christian (i.e. murder on a heathen is worse than murder of a Christian) because the soul is beyond redemption when a person dies a heathen. NgL, I, p. 340: “Þui er hæiðit morð uærra en cristið at firi faret er Þess manz salo er hæiðin doyr”. For a more through discussion based upon the Christian laws see Rindal, ‘Dei eldste norske kristenrettane’, pp. 116–118. Killing of newborns in pre-Christian and early Christian Old Norse society is discussed by Else Mundal, ‘Barneutbering’, *Norskrift* 56 (1987), pp. 1–78.

manslaughter. According to Sandvik it was possible to discover infanticide by investigating whether or not unmarried women had milk in their breasts.²⁹ I have not found this practice described in the short notices in *Nils Stubs*, but the *Townlaw from Nidaros* prescribes a similar investigation undertaken by two women “if the daughter of a farmer is accused of having born a child”.³⁰ Also in Late Medieval Stockholm this practice is noted in the record books,³¹ and as late as 1704 this practice is documented by Lizzie Carlsson from Sweden.³² In addition to the abovementioned cases of infanticide, *Nils Stubs* notes several cases of murder which entailed the death penalty³³ and Steinar Imsen³⁴ points to the continuity in such cases from the period 1300–1560 and well into the seventeenth century. Legislation prescribing the death penalty for theft was not a novelty in the seventeenth century either. Kari Ellen Gade has convincingly argued that hanging was a very old punishment for theft, and in the mid-sixteenth century *Nils Stubs* notes several thieves who were sentenced to death.³⁵

It is difficult to assess to what extent these cases represent the tip of the iceberg, but at least this excursus into crimes other than the sexual has strengthened my claim that the death penalty was no novelty during the seventeenth century.

There still remains the examination of one distinctive element of sexual crimes; why is there such an obvious gender-differentiation in the punishment of these acts. Regarding the criminal aspects of sexuality one notes that even in cases of adultery, where one would expect to see as many women as men punished, far more men were sentenced.

²⁹ Sandvik, ‘Tidlig moderne’, p. 121.

³⁰ *Bjarkøyretten*, p. 91.

³¹ Österberg and Lindström, *Crime and social control*, p. 187.

³² Carlsson, ‘De medeltida skamstraffen’, p. 131.

³³ *Nils Stubs*, pp. 6, 11, 24, 39, 55, 87.

³⁴ Imsen, ‘Kunsten å konstruere’, pp. 489–492.

³⁵ For instance the *Landslaw NgL*, II, pp. 168–169 uses terminology which show that the thief could be killed, *dræpr* (IX 1:3) or that he should loose his life “oc lifino með” (IX 1). *The Law of the Castle*, (1299–1319) mentions explicitly hanging (*verði hengðr*). For older legislation see particularly Gade, ‘Hanging’, *passim*. *Nils Stubs*, pp. 55–56, 69, 150, 186, 206 mentions people condemned to death for theft. *Nils Stubs*, p. 207 also notes Gregers who had stolen an ox, but because of his poverty and for the sake of his poor children he was granted a reprieve, but if he stole again, he would loose his life.

PART C

GENDER EQUALITY?

To complement the analysis of the previous two parts, I shall here discuss the hypothesis that laws against sexual crimes promulgated after the Reformation put women at a disadvantage. The general focus has been on adultery and fornication. It is argued that during the medieval period only males were punished, and then exclusively by having to pay economic compensation to the woman's family. After the Reformation these acts were criminalised, for both males and females—which in comparison implied a deterioration in the position of women. A similar development is said to characterise the other Nordic countries.¹

Supposedly, the position of women who had committed illegal sexual acts worsened not merely in regards to criminal law, but also to civil law. Referring to the *Privileges of the Nobility* of 1622 and the *Norwegian Law* of 1687, Sogner, Lindstedt Cronberg and Sandvik propose that aristocratic women in particular were targeted by exceedingly strict legislation. According to the *Norwegian Law* of 1687 an aristocratic woman who initiated illegal sexual relations forfeited all her property to her nearest heir and lost the right to socialise with her peers. The law also authorised the lady's guardian to keep her under lock and key as long as she lived and he was entitled to dispose freely of her inheritance. These rules have been seen as an expression of increased callousness during the era of Lutheran orthodoxy, and have been described as "[...] the purest example of the link between female gender, honour, and sexuality."² In how far these rules were applied in practice has—so scholars admit—not yet been examined. Yet I shall show that during the period 1300–1600 similar principles were enforced based on the *Landslaw*.

Another common argument claims that one of the main reason for the criminalisation and punishment of extramarital sexuality was the far greater value attached to marriage after the Reformation. As a

¹ Gunnlaugsson, 'Sedlighetsbrott', p. 112.

² Sogner, Lindstedt Cronberg and Sandvik, 'Women in Court', p. 190.

consequence of this heightened esteem, women who had pre- or extra-marital sexual relations were supposedly in a far worse situation than during the Middle Ages.³ In the following, I discuss to what extent this view can be maintained.

In chapter 8 we will see that women were considered liable to criminal prosecution for exactly the same crimes under both medieval and post-Reformation legislation. Therefore, I refute the claim that women's criminal responsibility was first fully introduced after the Reformation. I will also look in more detail at actual legal practice, and explain why men were brought to court for sexual crimes far more frequently than women. This pattern can be traced for the period 1300–1600, as well as in seventeenth-century sources, although there are some variations depending on whether the cases involved adultery, fornication, or incest. In chapter 9 we see that the introduction of legislation which aimed at regulating the female elite's sexual life with the threat of the loss of inheritance was not limited to a period characterised by an austere Lutheran world-view. Regulations of this kind had been introduced to Norwegian law already in the High Middle Ages. They might be seen as the elite's answer to catholic teaching where the consent of the partners alone, without the parents' approval, sufficed to conclude a valid marriage. Lastly, chapter 10 will show that the hypothesis claiming that the prestige of marriage was enhanced after the Reformation cannot be defended.

³ Sogner, Lindstedt Cronberg and Sandvik, 'Women in Court', p. 183; Bastiansen, 'Væ dig Bergen', pp. 26–27; Terjesen, *Blodskam og leiermål*, pp. 34–39; Aarset, *Rettslig regulering*, pp. 14–15; Telste, *Mellom liv og lov*, pp. 60, 68–69.

CHAPTER EIGHT

WHO WAS PUNISHED, AND FOR WHAT?

Both before and after the Reformation the definitions in legislation which determine whether it was the male or female perpetrator of a given sexual crime who was considered the culprit are not surprising. Laws concerning rape for example state that the man was the guilty party, while both men and women were guilty in cases of adultery. The picture is completely different if we look at actual legal practice. The numbers show a clear majority of men being accused and sentenced by the public authorities during the period 1300–1600, a fact which requires further examination. This imbalance also appears in those categories of sexual crimes where one would expect a more level distribution, such as with adultery, fornication and incest. I shall therefore concentrate on these categories in the following. First, however, it is necessary to take a look at some important points of the legislation.

The legislation against adultery shows a certain gender differentiation in its use of terms such as adultery (*hór*) or adulterers who ran away (*brot laupa*). In cases of adultery, the high medieval Christian laws determined that men and women had to pay the same fines.¹ This consistent gender equality changed in one respect after the Reformation: capital punishment meant beheading for men and drowning for women in cases of whoring in the third instance.² The other version of adultery, where the unfaithful spouse “ran away” with a new partner was defined as a male crime in the younger Christian laws, in the *Landslaw*, and in the *Norwegian Law* of 1604. This unilateral focus on the man as the culprit may come from the term’s original meaning, the abduction of women, and which can be found in late twelfth century legislation.³ However, a decree of 1478 makes married women—*kaaner*—who ran away from

¹ NB II § 22, (*NgL*, IV, p. 173). Cf. NB § 18 (*NgL*, II, p. 301); NG § 26 (*NgL*, II, p. 320); J § 44 (*NgL*, II, p. 371).

² The Danish pre-Reformation law on adultery, which the post-Reformation law is based on, also makes a gender differentiation regarding the sentence: beheading for men while women were to be buried alive. See the overview in the preceding chapter 4. Capital Punishment the section on Punish and Purge.

³ See the overview in the preceding Chapter 1 the section on *Adultery*.

their husbands also liable to prosecution in the same way as men, which is also the approach of the *Norwegian Law* of 1687.⁴ Women too were liable to prosecution for fornication, as in the *Townlaw from Nidaros* and later in the *Ordinance against loose living* of 1617. Regarding incest, all legislation from the younger Christian laws to the *Norwegian Law* of 1687 prosecutes both men and women.

Adultery

In the vast majority of cases involving adultery from the period 1300–1600 we find only evidence that one of the parties involved was punished and that was usually the man. Telste's, Terjesen's and Bastiansen's studies on legal practice in the seventeenth century note the same pattern. The two latter discuss cases of adultery, basing their work mainly on the registers of fines in the account rolls, which are also my main sources for the post-Reformation sixteenth century. It is important to stress that these sources tell us only about those cases where a fine was paid, they tell us nothing about those cases ending in acquittal.⁵ Most of Telste's cases are taken from the registers of the *thing* assemblies which contain all the notes taken by the registrar (the *sorenskriver*, lit. the "sworn scribe"),⁶ these include notes on cases ending in an acquittal.⁷ Consequently it is much more likely that Telste has found more cases of acquittal or abatement than Terjesen, Bastiansen and I have. In order to facilitate comparison I shall therefore first dis-

⁴ *NgL*, 2rk, II, p. 271; *Kong Christian den Femtes Norske Lov: 15de april 1687*, 6–13–22, p. 256. This gender neutral definition was also used before the Reformation in legal practice. In four cases of runaway women—the expressions *bortt løp* and *løp bortt* are used—from the account year 1528–1529 in Øvre Romerike (southern Norway), fines were collected from the women. *NRJ* IV, pp. 337, 339.

⁵ Bastiansen, 'Væ dig Bergen', pp. 4–5 chose the registers of the fines from 25 account rolls of fiefs of the period 1597–1669. The vast majority of Terjesen's cases come from account rolls, and some from *thing* records. Terjesen, *Blodskam og leiermål*, pp. 8–9, 72, 75–83.

⁶ The *sorenskriver* was originally appointed to serve as a clerk and to instruct the jurors. Gradually, he acquired increasing competence as a judge, and in 1687 he became the sole judge in the local courts. Tamm et al., 'The Law', pp. 45–46.

⁷ Telste, *Mellom liv og lov*, pp. 44–48, explains the total number of sexual crimes and how these are recorded in the *thing* records (presumably those who did or could not reach an agreement with the steward), or the account rolls and the notes on them by the exchequer (*rentekammer*). However, many volumes of the account rolls are missing because the *len* was sub-leased in return for a yearly payment.

regard Telste's data. By contrast, Terjesen's and Bastiansen's studies can be compared to my findings, especially for the post-Reformation sixteenth century.

Numbers in the following table are in percent.

Table 4. Adultery 1537–1600, cases and gender distribution.
Numbers in percent.

	Cases with men only	Cases with women only	Cases with men and women	Cases with unknown gender	Total
Middle Ages ⁸	76	21	0	3	100
1537–1600 ⁹	75	14	11	0	100
Bastiansen, 1597–1669 ¹⁰	86	6	8	0	100
Terjesen, 1602–1661 ¹¹	73	11	16	0	100

Terjesen sub-divides her overview into ten-year intervals, which shows interesting variations within her study. During the period 1612–1621 the distribution shows 96 percent men as opposed to only 4 percent women, while the following period 1622–1631 has 54 percent men, 14 percent women, and 32 percent both men and women. Terjesen's data do not however allow us to draw any conclusions concerning the development over time.¹²

Which factors might explain this gender disparity? After all, when looking over a long period of time, in approximately three quarters of all cases of adultery it was the men who were punished. A study by Rudolf Thunander from seventeenth-century Sweden shows the same

⁸ 38 cases of adultery from the Middle Ages concern 29 men, 8 women and 1 with unknown gender.

⁹ Of a total of 180 cases, we have information only on men in 135 cases, only on women in 25 cases, and men and women were brought before court in 20 cases.

¹⁰ Bastiansen, 'Væ dig Bergen', pp. 89–90. Of 37 cases 35 ended with fines, and of these 35 cases men alone paid in 30 cases, women paid in 2 cases, and men and women paid in 3 cases.

¹¹ Terjesen, *Blodskam og leiermål*, pp. 81–82. Of 195 cases (of which 171 were simple adultery in the first instance), men in 142 cases (73 percent), women in 21 cases (11 percent), and women and men in 32 cases (16 percent).

¹² Terjesen, *Blodskam og leiermål*, p. 82.

pattern.¹³ In a gender-differentiating perspective adultery is particularly interesting because it stands out so clearly as a male crime and that is in spite of its gender-neutral legislation. Terjesen presents the cause for this gender disparity as being that the men were atoning for the women, without there being any special mention of this in the sources.¹⁴ The hypothesis is not unattractive; however, the problem is that the conclusion is based on an argument *ex silentio*—and, of course, there is the fact that some women *were* accused and punished.

Terjesen, Telste and Bastiansen document that adultery mainly occurred between married and unmarried partners. In other words, double adultery was uncommon. This pattern also seems to hold for the post-Reformation sixteenth century. When it is possible to detail the distribution, nine out of ten cases involve simple adultery. However these cases only very rarely provide us with information about whether it was the man or the woman who was married.¹⁵ Yet since in the preponderance of cases it is men paying fines, one needs to ask why. Terjesen proposes that civil status might be a factor in the puzzle as to why many more men than women were sentenced for adultery, and she notes that it was more likely that a married woman was charged than an unmarried woman.¹⁶ Out of 10 cases of double adultery 7 women and 8 men were accused.¹⁷ In comparison, 148 men and only 23 women were married out of the 171 cases of simple adultery in the first instance.¹⁸ In 57 percent of the cases where a married woman had been unfaithful an unmarried man was charged. In comparison, in only 13 percent of the cases where a married man had been unfaithful was an unmarried woman was charged.¹⁹

Therefore Terjesen's conclusion that a woman was more likely to be charged when she was married rather than unmarried is based on extensive source material. However, Telste arrives at precisely the opposite conclusion. In all of Telste's 33 cases of adultery there is

¹³ In 78 percent of cases adultery (435 of 560 cases) the married partner was the man, and the data concern Göta Hovrätt (Göta High Court) from the period 1635–1644. Rudolf Thunander, *Hovrätt i Funktion: Göta Hovrätt och Brottmålen 1635–1699*, Rätts-historiskt Bibliotek 49 (Stockholm: Nerenius & Santérus Förlag AB, 1993), p. 97.

¹⁴ Terjesen, *Blodskam og leiermål*, p. 82.

¹⁵ In none of the medieval cases is it possible to distinguish between simple or double adultery.

¹⁶ Terjesen, *Blodskam og leiermål*, pp. 81–84.

¹⁷ Terjesen, *Blodskam og leiermål*, p. 83.

¹⁸ Terjesen, *Blodskam og leiermål*, pp. 81, 83.

¹⁹ Terjesen, *Blodskam og leiermål*, p. 79, table 9.

merely one where both partners were married. In the remaining cases which have only one married partner, 4 women were suspected but none of them were punished.²⁰ In the 29 cases where Telste notes that “husbands were suspected” 11 unmarried women were summoned, of which 8 were sentenced.²¹ In short, Telste’s conclusion is also well documented. However, it can be argued that the difference between Terjesen and Telste regarding the sentencing of married women may be due to the fact that Telste’s conclusions are based on relatively fewer cases. Terjesen, as well as Bastiansen, Natvik and Løyland list examples of married women (although relatively few) who paid fines to the king, a practice which is also documented from both the Middle Ages and the post-Reformation sixteenth century.²²

Another relevant question which has been raised is whether social status was a factor in the over representation of men in adultery cases. Telste discusses whether this may have been due to farmers abusing their position and forcing their maids to have sex with them. Although Telste quotes some cases where farmers did exert pressure or force, I agree with her conclusion that there is not sufficient data to assert that they enjoyed some sort of unwritten “right”.²³ From the post-Reformation sixteenth century there are very few clear cases where the farmer or his sons had sexual relations with maids.²⁴ An interesting case is that of Signill of Helgeland who was fined because of having committed adultery with her male servant in 1567, thus showing reversed gender roles. The man is not named; he is only called Signill’s servant. In this case social status would seem to have been decisive; Signill as the employer would have been able to take advantage of the young man who was

²⁰ Telste, *Mellom liv og lov*, pp. 155–156.

²¹ Telste, *Mellom liv og lov*, pp. 155–159.

²² Margit Løyland, *Slagsmål, leiermål og botlagte egder 1600–1700* (Oslo: Tingbokprosjektet, 1992), p. 115 lists a married woman who was unfaithful, where the woman’s husband paid the fine; Natvik, ‘*Brotsatferd i Sogn og Sunnfjord*’, pp. 134–139, describes a case from 1612 where a married woman and an unmarried man were fined for simple adultery. Løyland and Natvik’s studies do not concentrate specifically on sexual crimes and do therefore not indicate the distribution between men and women.

²³ Telste, *Mellom liv og lov*, pp. 155–156, 160. In 33 cases 4 women were suspected. 29 women had had relations with married men. About half of all cases do not give information on the social status of the women, of the other half 7 women were maids, 5 loose women, 2 widows and 2 married women.

²⁴ Three cases where the married farmer had had relations with a maid, *NLR*, I, p. 76, year 1557; *NLR*, II, p. 146, year 1560; *Nils Stubs*, p. 41. An unpublished account roll for Sunnhordland for the year 1597 lists two men who paid fines for fornication with, respectively, the mother’s and the stepfather’s maid.

working for her.²⁵ Social status may have been a factor in some cases of adultery, an interpretation which is to a certain extent also supported by research from Sweden.²⁶ Yet social status alone cannot explain the prevalence of men.

Telste proposes an interpretation which presupposes that men and women had different attitudes towards sexuality and fidelity. Adultery stood in contradiction to what was acceptable behaviour for women. According to Telste, married women's lifestyle was such that is almost excluded the possibility that they could be suspected of adultery; in contrast to men who lived according to quite different norms. The husband or farmer was the head of the household. Within this patriarchal family structure it was his responsibility to provide and protect, as well as to rule over family members and servants. The husband or farmer had more leeway to decide what he did or did not want to do, and he was more inclined to be whoring. Therefore Telste argues that the statistics reflect reality, in the sense that married men were more likely to be unfaithful than married women, a view shared by Sogner, Lindstedt Cronberg and Sandvik.²⁷

However, I remain unconvinced by an explanation which simply presupposes that married women were so much better at reining in their desires than both married men and unmarried women. In addition, there is an important methodological problem: it may be pertinent to examine whether the overrepresentation of men is real. It is important to remember that the numbers showing that more men than women were sentenced are calculated from surviving legal documents and registers of fines; these documents only show us the adulterous relationship that had become public knowledge.

In this respect Bastiansen's analysis is an interesting and important corrective. She lists 37 cases of adultery, of which 1 is double, and the remainders are cases of simple adultery. For this latter category, Bastiansen has enough data to deduce that 19 men and 17 women were

²⁵ *NLR*, V, p. 230, year 1567. Signill's case is not unique; another woman was fined for adultery with a *dreng*, *NLR*, V, p. 235, year 1567.

²⁶ Thunander, *Hovrätt i Funktion*, pp. 97–98 discovers that a large part of the judgements in cases of simple adultery brought before *Göta Hovrätt* (in the period 1635–1644) involved married farmers having sex with their maids. There may have been differences within various parts of Scandinavia in this respect.

²⁷ Telste, *Mellom liv og lov*, pp. 178, 184; Sogner, Lindstedt Cronberg and Sandvik, 'Women in Court', p. 191.

married, showing an almost balanced gender distribution.²⁸ In one of these 37 cases the punishment meted out to the culprit is unknown; in another one the man was imprisoned. The remaining 35 cases all resulted in payments of fines and men are strongly overrepresented. In 30 cases, only the men paid any fines, while there were only 2 cases where only the women paid and 3 cases where both the men and women paid. In percentage the distribution is 86 men, 6 women and 8 both men and women.²⁹ Bastiansen's distribution is almost identical to that which Terjesen arrived at for people who committed simple adultery for the first time.³⁰ It is also similar to my calculations of how many men and women paid fines during the post-Reformation sixteenth century.³¹ Thus Bastiansen's analysis underlines an important methodological point: it shows that in cases of adultery where the only information we have is who paid the fine, it is not necessarily possible to conclude who committed the crime.

In Bastiansen's examination married women are just as likely to be unfaithful as married men, but at a certain point either before or during legal procedures, the women disappear from the sources. The information on who paid the fines—usually the men—therefore does not automatically indicate whether it was the men or the women who were unfaithful, and the greatest care should be taken when using such information to support claims that married women led a morally blameless life. I propose an alternative hypothesis which is also alluded to by Telste, based on a case from 1670. The steward brought charges against a man who had eloped with a married woman for the second time, demanding outlawry for the man, and a whipping and banishment for the woman. The man was subsequently imprisoned for life at Akershus, while the woman got off lightly by submitting to Church discipline because her husband forgave her. Telste notes that in this case the husband's forgiveness may have influenced the sentence handed down to the woman, but she does not discuss any further how accusation

²⁸ Bastiansen, 'Væ dig Bergen', p. 88.

²⁹ Bastiansen, 'Væ dig Bergen', pp. 89–90.

³⁰ Terjesen, *Blodskam og leiermål*, p. 79. There were 23 cases where the married partner was a woman; in the remaining 148 cases the married partner was a man.

³¹ Out of these 180 cases in total, in 8 cases the accused was either acquitted (4 cases, of which 3 women and 1 man), or the result is unknown (1 case, a woman), or the final decision was delayed (3 cases, of which 1 man, 1 woman, and 1 both man and woman). Unfortunately there is not information concerning the cases of single adultery to decide on who was the married partner.

and punishment by public authorities might have been related to rights of the husband.³² In the following we will examine this interesting and important issue, which may help to explain the preponderance of men in cases of adultery.

A decree issued by Håkon V Magnusson (1299–1319) for Bergen, which has already been discussed above in Chapter 1, the section on *Prostitution and Moral Looseness*, stipulates that an unfaithful wife had to do penance (*bøtt vider god*) and repay her husband (*bonda sin*), admittedly without giving any more details as to how this was to be done. After the husband had forgiven his wife, he was to announce the reconciliation to the lawman and the town bailiff (*radmen*).³³ This decree stresses the duty of the unfaithful woman to make amends with God and her husband. Surprisingly, the economic interests of the bishop are not at all mentioned, although high medieval Christian laws treat men and women as equals in cases of adultery, also with regards to fines.³⁴ We have also seen that several prohibitions in this decree was re-enacted in the post-reformation bye-laws of Bergen, particularly in a decree of 1573. Indeed, the decree of 1573 stipulates that it was forbidden a *husbonde*³⁵ to house “whoring women, who have not taken public confession or are forgiven by their husbands” (*nogen hore Qvinder, som ikke have taget aabenbare Skrift, eller ere benaadede af deres Mænd*).³⁶ Yet again, we see that an unfaithful wife was supposed to make amends with God and her husband.

This is not the only example of legal concepts which accord the right to decide over criminal charges to the head of the family. A decree from 1514 states that if the *bonde* or the head of the family wanted to press charges in cases where daughters, wives or servants had been involved

³² Telste, *Mellom liv og lov*, p. 194. She remarks in note 3 that the wife’s pardon does not seem to have had any influence on the sentence of men who ran away with other women.

³³ *NgL*, III, p. 211.

³⁴ For example in NB II § 22, (*NgL*, IV, p. 173), which state clearly that either the husband (*madher*) or the wife (*kona*) was unfaithful, and that both had to atone. Cf. NB § 18, (*NgL*, II, p. 301); NG § 26, (*NgL*, II, p. 320); J § 44, (*NgL*, II, p. 371), and the discussion of the legislation in Chapter 1 of this work.

³⁵ This “husbonde” bore the responsibility for the inhabitants of the “gårds” in Bergen. The gårds had internal regulations for common payment of rent, guard-duty, use of the kitchen etc. They also attempted to prevent quarrels and fights, and to restrict contact with loose women. Helle underlines that the (Norwegian and German) property-owning “husbondene” provided the link between the authorities and the family members they were responsible for. Helle, *Bergen bys historie*, pp. 537–538, 744.

³⁶ *Samling af Gamle Norske Love*, 2. Part, p. 368, point 26.

in illegal sexual relations was at the discretion, the steward ought to help the *bonde*.³⁷ The steward, the decree specifies, cannot initiate a lawsuit on behalf of the public authorities.

Legislation along these lines was not unique to Norway. Brundage sees the fact that charges were raised against unfaithful men while unfaithful women were punished by their husbands as customary law in several European regions during the Middle Ages.³⁸ Also Danish and Swedish medieval legislation is clearly influenced by this principle. Chapter 14 concerning *Sacrilege and Adultery* of the Danish ecclesiastical law of Zealand rules that it was the husband's decision whether or not to bring charges against an unfaithful wife.³⁹ Several Swedish regional laws underline that no one but the husband could bring charges against an adulterous wife, unless her adultery was known to all in the district, in which case the bishop's steward could bring charges against her.⁴⁰ It is also interesting to note that a late medieval Swedish law compares those who seduce married women to thieves. The *Book on Thieves* in the Swedish *Landslaw* of 1442, formulated under Christopher of Bavaria, states that the best possession a farmer has is his legally wedded wife. Furthermore, the law points out that the man who steals her from the farmer, he is the worst and biggest thief. If the lover was caught red-handed and sentenced accordingly, he was to be "hanged higher than other thieves".⁴¹ With that, his humiliation would be the greatest possible.⁴² The punishment was in proportion to the crime; the thief had stolen the farmer's "best possession". Thus, it seems that adultery was considered to be far more than a mere break of moral or ethical norms and that this was understood to represent the theft of a woman's sexuality.

³⁷ Decree of 1514, *NgL*, 2rk, IV, pp. 65–66. Formally, Christian II's legislation did not remain in force for long, since his laws were abrogated when he was deposed in 1523. However, the principles reflected here were not unique.

³⁸ Brundage, *Law, Sex, and Christian Society*, p. 519.

³⁹ *Danmarks gamle Landskabslove*, vol. VIII, *Valdemars Sjællandske lov, Ældre og yngre redaktion samt Sjællandske Kirkelov*, ed. by Erik Kroman (København: Gyldendal, 1941), pp. 452–453: "hor sak ma ængen man manz konæ giuæ num han siælf" [No man shall raise a case of adultery against a married woman, except her husband]. *Danmarks gamle Love paa nutidsdansk*, ed. by Erik Kroman and Stig Iuul (København: Gad, 1945), p. 235, gives a translation into modern Danish. This law was formulated during Archbishop Absalons incumbency; *Danmarks gamle Love paa nutidsdansk*, p. 227.

⁴⁰ *KL*, XX, p. 506.

⁴¹ *KL*, XX, p. 506.

⁴² Gade, 'Hanging', p. 167 remarks that the higher up a criminal was hanged, the greater the humiliation. Hanging was a common form of punishment for thieves.

The right to make decisions about a woman's sexuality was granted to the head of family, the husband, father, or possibly the employer.

This shows that medieval Norwegian, Swedish and Danish regulations accepted that married women were also unfaithful, but that in such cases it might have been at the husband's discretion whether or not charges would be brought against the wife. It is possible that such rules were originally devised to counter the Christian laws which per definition made adultery a crime committed by men *and* women. In comparison, the *Book on Personal Rights* in the oldest extant secular legislation views adultery as an insult to the rights enjoyed by the man over the woman's person, and not as an attack on marriage as a sacrosanct institution. Norwegian laws betray this concept by granting the husband the right to take revenge—to kill his wife's lover—or to claim economic compensation, which remained the only legal sanction after the promulgation of the *Landslaw*. A husband's rights over his wife may well have been so ingrained in popular custom that perhaps new ecclesiastical principles had not yet become universally accepted. In contrast, enforcing the principle that the male lover was to be brought before a public court was probably much more straightforward; in any case he had to pay compensation to the cuckolded husband. This made the next step, fines to the bishop, much simpler.

At least as far as Norway is concerned, for a long time adultery committed by the wife seems to have entailed a number of aspects which existed side by side. First, it was a sin in the eyes of God. Second, if the husband refused to pardon her or if it had been very public it was considered a crime against the bishop and after the Reformation it was considered a crime against the king. Last, but by no means least, it was an infringement on the rights of the husband. I propose that the explanation for the conspicuous absence of unfaithful wives in the medieval and Early Modern public registers of fines is that the system granted the husband the right to decide whether or not his wife was to face charges for adultery. Conversely, the refusal by the husband to pardon his wife—and possibly the very public character of the crime—may explain why some women were in fact charged.

Fornication

In cases of fornication the imbalance in the distribution of gender is by far the greatest, with men vastly outnumbering women; overall more

than 90 percent of the culprits as they appear in the legal records are men. In part A I refuted the claim that the criminalization of fornication was a post-Reformation phenomenon, a claim which in particular has been connected to the *Ordinance against loose living* of 1617. This ordinance makes a clear distinction between relations which led to eventual marriage, and relations of a less enduring character. In the former case, a fine—to the sheriff—was possible,⁴³ as authorised also by the *Koldingske Reces* of 1558.⁴⁴ Throughout the seventeenth century, this rule was applied in a highly consistent manner; the man paid the fine for both partners—as was also mandated by the *Norwegian Law* of 1687.⁴⁵

Yet the most debated part of the ordinance concerns fornication without ensuing marriage. In this case, women were to pay a fine to the king; however it was merely half as high as the man's fine.⁴⁶ A plausible reason for this may be that women's economic power was correspondingly lower than that of men.⁴⁷ It is particularly important to consider in more detail the claim that the decree of 1617 led to more women than men being punished. A common explanation for this development is a royal pardon from 1671, which abolished public punishment for soldiers in cases of fornication in the first instance.⁴⁸ In the following period during which expenses for the military rose to astronomic heights, it is therefore claimed that the female partners increasingly came into focus as a source of income.⁴⁹

⁴³ *Danske Kirkelove*, vol. 3, p. 62.

⁴⁴ *Forordninger, Recesser og andre kongelige Breve*, vol. 1, p. 41, chapter 60 for a violator of virgins' (*jomfrukrenker*), a fine to the king (*herskaf*). Also from the post-Reformation sixteenth century we know of a few cases which show that the distinction between fornication with or without ensuing marriage was made in legal practice. *NLR*, IV, p. 197. In 1567 for instance, Storgeir and Torstein paid fines to the king because they had lain with women before the priest had read the banns, which tells that marriage was forthcoming, although not as prescribed.

⁴⁵ The different studies agree on this point. Terjesen, *Blodskam og leiermål*, pp. 67–68; Kirkeby, 'Soldater og leiermål', p. 412; Telste, *Mellom liv og lov*, pp. 84–86.

⁴⁶ *Danske Kirkelove*, vol. 3, p. 62.

⁴⁷ According to Sogner *Krig og fred*, p. 212 a male servant boy received twice the amount of wages compared to a female servant.

⁴⁸ Sandvik, 'Tidlig moderne', p. 120.

⁴⁹ Sogner, Lindstedt Cronberg and Sandvik, 'Women in Court', p. 185, note 62. According to Sandvik, 'Tidlig moderne', p. 133 public authorities did not consciously pay more attention to women; rather, this was an unintended consequence of a wider military policy. This was later exacerbated by the fact that the stewards were allowed to retain the fines for fornication.

Up until now, the most comprehensive and in fact the only examination which corrects and partly re-assesses the accepted interpretation of the decree of 1617 comes from Birger Kirkeby.⁵⁰ He argues that the selection of decrees is tendentious, since soldiers continued to be charged and accused in line with military decrees. By ignoring this fact, the degree to which the position of women deteriorated vis-à-vis that of men may be exaggerated.⁵¹

In addition, the results of detailed studies of the seventeenth-century source material regarding the relative numbers of men and women paying fines are also not as unequivocal as more general works claim. Kirkeby calculates that women paid fines in 1.4 percent of all cases of fornication in Øvre Romerike (South-East Norway) during the first three decades of the seventeenth century, and in 6 percent of the cases in Agder, southern Norway, during the same period (the figures from Agder are quoted from *Aschehougs Norgeshistorie*).⁵² Terjesen counts 159 cases of fornication for the period 1602–1617 and women paid fines in 5 of these (3 percent).⁵³ From the post-Reformation sixteenth century we know of 498 cases of fornication, unfortunately we lack the information necessary in order to be able to distinguish between fornication with or without ensuing marriage in the majority of these cases. We do know that some women paid fines to the king because they had committed crimes of fornication, concubinage, or led a loose life. The gender distribution here shows that in 92 percent of the cases fines were paid by men, 6 percent involved fines paid by women and only 2 percent of the cases give information that both men and women paid fines.⁵⁴ The clear conclusion is that before 1617 women paid fines for fornication as well, although only very few. However, according to the generally held views, this pattern was reversed during the last three decades of the seventeenth century.

In 1671 a royal pardon was issued exempting soldiers from public punishment for fornication in the first instance. After this time, it is

⁵⁰ Kirkeby, 'Soldater og leiermål', pp. 409–420. The article is the basis for comments to Sølvi Sogner's chapter on soldiers and fornication in *Aschehougs Norgeshistorie* vol. 5, while Sogner's work is inspired by Terjesen, Telste, Løyland and Natvik. Sogner *Krig og fred*, p. 238.

⁵¹ Kirkeby, 'Soldater og leiermål', pp. 411, 413, 417.

⁵² Kirkeby, 'Soldater og leiermål', p. 410.

⁵³ Terjesen, *Blodskam og leiermål*, p. 66.

⁵⁴ In total 498 cases, of which 458 cases with men only, 27 cases with women only, and 13 cases with both men and women.

therefore pertinent to ask how many of the men who were liable to punishment (all men charged of fornication excluding soldiers) actually paid their fine.⁵⁵ This methodological point has been made by Telste, who notes that from 1651 to 1661, 61 percent of men and 3 percent of women paid fines. This is followed by a period during which the number of females paying fines increased, but even during the period when the level of fines was at its highest, 1681–1690, merely one in four women paid fines, as opposed to 59 percent of men (all men charged of fornication excluding soldiers). Then again during the decade 1691–1700 a mere 2 percent of women paid fines. Clearly, there is no linear development. It is also worth noting that, with the exception of the first interval (1651–1661), the fluctuations in the number of people paying fines for fornication are more or less parallel for men and women. During those decades when relatively few men paid fines, relatively few women paid as well.⁵⁶ Such a pattern may be due to regular occurrences of increased poverty and suffering, a factor affecting both men and women.⁵⁷

Therefore, in order to comment on the question of whether and when the position of women deteriorated as a consequence of the decree of 1617 the numbers need to be adjusted, since after 1671 soldiers per definition were exempt from paying fines to the king for fornication in the first instance. Only then can one discuss whether there is a real trend which points to changes in the pattern of fines for men and women throughout the seventeenth century. However, since only Telste adjusted her numbers it is difficult to make a definite pronouncement on general developments. Also as Kirkeby emphasises, in order to be able to make a pronouncement on changes over time, more studies of seventeenth-century sources are a prerequisite.⁵⁸

⁵⁵ A comparison of the relative frequency of fines for men and women based on the account rolls of the fiefs can for example not answer this question. For this, it is necessary to consult sources which at the same time bear witness to earlier stages of the legal development, while also overlapping with the final stage, where we have the account rolls of the fiefs.

⁵⁶ Telste, *Mellom liv og lov*, pp. 99–100, especially table 19.

⁵⁷ Telste, *Mellom liv og lov*, p. 101.

⁵⁸ Kirkeby, 'Soldater og leiermål', pp. 419–429. It may be worthwhile to examine whether the position of women in cases of fornication only deteriorated during the eighteenth century. According to Sandvik, 'Tidlig moderne', pp. 120–121 cf. p. 133, from 1723 on fines for fornication were added to those fines the stewards could keep themselves, and in 1734 a new law was issued which made it impossible for women

Who then, were the (very few) women fined for fornication? Bastiansen documents that the few women who did pay fines for fornication were notorious.⁵⁹ As Grethe Authén Blom and Kirkeby stress, in a society where everyone knew one another and much of each others affairs, it would have been difficult to claim a woman's "looseness" if this had not been the case.⁶⁰ Also the system, which allowed the heads of households to decide whether members of that household, including unmarried women, were to face charges for illicit sexual behaviour, may help to explain the preponderance of men.

Also physical punishment in the shape of whipping was traditionally considered suitable for women guilty of fornication without ensuing marriage, and indeed in general for loose women. The decree on fornication of 1617 prescribes whipping for both men and women who were insolvent, and for women who led a loose life—for so-called "third-time-offenders".⁶¹ A decree for Oslo from 1575 states that so-called "loose women" who had relations with married men were to be whipped,⁶² but as Nils Stub's protocol of the lawthing in Oslo shows, the involved husbands just as frequently got a taste of the whip.⁶³ It is possible that there were both regional and chronological variations regarding the use of the whip. Bastiansen finds that physical punishment was more and more frequently used in Bergen for insolvent criminals, especially after 1660, and she assumes that it was first and foremost loose women and prostitutes who were whipped, quoting twelve such cases.⁶⁴ Terjesen finds evidence of two women who were whipped, and both had had relations with two men.⁶⁵ Also Kirkeby only finds two women who were whipped.⁶⁶ Telste notes only eight women who were whipped and she argues that the attitude of individual officials towards physical punishment may have played a role. Whipping for fornication disappears after 1699, when a new vice-registrar was appointed.⁶⁷

to ask for marriage based on an oral promise, henceforth, a written promise made in the presence of witnesses by a man older than 25 years was necessary.

⁵⁹ Bastiansen, 'Væ dig Bergen', p. 75, cf. also p. 96.

⁶⁰ Kirkeby, 'Soldater og leiermål', p. 411; Blom, 'Loven og livet', pp. 567–569.

⁶¹ Næss and Österberg, 'Sanctions', p. 148. *Danske Kirkelove*, vol. 3, p. 62.

⁶² Nils Stubs, p. 90.

⁶³ Nils Stubs, pp. 87, 156, 158, 194, 195.

⁶⁴ Bastiansen, 'Væ dig Bergen', p. 92.

⁶⁵ Terjesen, *Blodskam og leiermål*, p. 57.

⁶⁶ Kirkeby, 'Soldater og leiermål', p. 415.

⁶⁷ Telste, *Mellom liv og lov*, pp. 125–126.

It is therefore difficult to gauge to what extent whipping was used as a punishment primarily against women in the Middle Ages and in the seventeenth century. This type of sentence is noted in the legal protocols only in exceptional cases, which allows for two very different interpretations: either whipping was rather rare, or, conversely, it was so common that it was not especially mentioned. One should also remember that the main aim of the case lists in the account rolls of the fiefs—our main source of information about cases of fornication—was to give a short account of the *finés* received.

Incest

Moving on to cases of incest, we discover that there continues to be a certain imbalance in the gender distribution. Although one would not expect this to be the case, on the whole, more men than women were accused of and punished for incest.

For the 19 medieval cases of incest, the information we have is primarily about the final judgement: usually fines, but occasionally also the death penalty, as with Nils Lykke. We also know of a stepfather who had to pay for *landsvist* because he had relations with his stepdaughter. In one case the accused (a man) was acquitted, and in 4 cases we lack information concerning the outcome. In 80 percent of the cases we have evidence of only the man being prosecuted, in 10 percent only the women are prosecuted, and in the remaining 10 percent both the men and the women were charged.⁶⁸ From the post-Reformation sixteenth century we know of 43 cases of incest.⁶⁹ Here, only the man was prosecuted in 58 percent of the cases, only women were prosecuted in 7 percent, and both men and women were prosecuted in 35 percent. The distribution of men and women according to the degree of kinship shows great variations. However, the margin of error is quite large since the total number of cases is very small. Only a few additional cases where only women were charged would change the statistical picture quite dramatically. Yet, the overall tendency is quite

⁶⁸ We know of 19 cases of incest from the Middle Ages, of which 15 only men, 2 women and 2 both women and men, in percent 80, 10, 10.

⁶⁹ In total 43 cases, of which 24 only mention men, 3 only women, and 15 both men and women.

clear: notwithstanding the degree of kinship, more men than women were accused of incest.

Table 5. Incest, Cases with Gender Distribution 1537–1600.
Numbers in Percent.

Degree of kinship	Cases with men only	Cases with women only	Cases with both men and women	Total
1st degree ⁷⁰	65	0	35	100
2nd degree ⁷¹	38	25	37	100
3rd degree ⁷²	40	10	50	100
Unknown and 4th degree ⁷³	88	0	12	100

The preponderance of men is less pronounced in the seventeenth century. Terjesen (first half of the seventeenth century) counts 60 men and 39 women charged with incest in cases not punishable by capital punishment, that is with relatives of the third (temporarily also of the second) degree.⁷⁴ Terjesen finds that there was no gender difference only with incest that was punishable by the death penalty, noting 30 men and 29 women.⁷⁵ Telste (the second half of the seventeenth century) notes 20 cases of incest, of which cases involving second cousins—13 in total—constitute the majority. She has found a balanced gender distribution regarding persons summoned to the local assemblies and persons sentenced.⁷⁶

⁷⁰ 11 only men, and 6 both men and women.

⁷¹ 3 only men, 2 only women, and 3 both men and women.

⁷² 4 only men, 1 only women, and 5 both men and women.

⁷³ 7 only men, 1 both men and women. 1 case with relatives of the fourth degree, the remainder is unknown. We do not always have information on the degree of kinship. In 7 cases the information is less precise, terms used are “relative” (*frende*), “somewhat related” (*noe skylt*), “close kin” (*nær slekt*), and “laying in kinship” (*lå i skyldskap*).

⁷⁴ Terjesen, *Blodskam og leiermål*, pp. 136–137, also table p. 117. On p. 113 Terjesen argues that relations between cousins entailed the death penalty during the period 1610–1637.

⁷⁵ Terjesen, *Blodskam og leiermål*, p. 108, table 17 for an overview.

⁷⁶ Telste, *Mellom liv og lov*, pp. 144–152. As Telste’s table 24 shows, 9 men and 9 women were summoned, 8 men and 7 women were sentenced, 1 man was pardoned, and it is possible that prosecution of 2 women was abandoned. Complete overview in Telste, *Mellom liv og lov*, p. 245, where two additional cases of *blodskam* lit. “shameful blood” are listed.

We have information showing that in almost two thirds of all cases of incest with relatives of the first degree during the period 1537–1600 only men were charged; in the remaining cases both men and women were brought before court. This case information is derived mainly from registers of fines in the account rolls or from Nils Stub's protocol of the lawthing, where comments are limited to no more than a line or two. Because we know very little about these cases, any explanations stating that coercion or a great difference in age might be the reason for the preponderance of men amongst the charged must remain conjectural. In 1572 for example, Nils Stub's protocol records a man impregnating his unnamed niece.⁷⁷ This may be a case where the age difference, possibly combined with coercion, led to the prosecution of the man, but not of the woman.

Studies on later periods and some information found in laws support the conjecture that age, mental state, elements of coercion and recidivism all had an effect on the severity of the sentence. Indeed, Norwegian law was familiar with these principles already in the High Middle Ages. *The Old Christian Law of the Frostathing* in principle decrees outlawry for both men and women in cases of incest with a close relative. Exceptions are made for men who were insane and for women who had been subjected to coercion. These women merely were to do penance, after consultation with the bishop.⁷⁸ Regarding women's criminal responsibility in these cases, coercion by the man was considered extenuating circumstances. This rule is also found in a similar formulation in *Archbishop Jon's Christian Law* of 1273, § 49.⁷⁹ Already in the oldest Christian laws people who refused to cease their prohibited behaviour were dealt with more severely than first time offenders who repented, and recidivism has been discussed in Part B of this work.

Torleif Hansen has examined cases in which an appeal was made in front of Bergen lawthing during the first three decades of the eighteenth century. He discerns a readiness to favour women with pardons and reprieves (especially of the death sentence), which he connects with coercion and dominance used over the women. It also appears that there was commonly a significant age difference between the women

⁷⁷ *Nils Stub's*, p. 8.

⁷⁸ F III § 3, (NgL, I, p. 149), *The Earliest Norwegian Laws*, p. 247.

⁷⁹ J § 49, (NgL, II, p. 375).

and men in those cases where we have the relevant information. Fifteen of the twenty-three women were younger than twenty, while the men commonly were ten years their senior. Frequently, a married man became interested in his wife's unmarried relative (sister or niece), or his step-daughter. The lawthing also usually annulled death sentences for those whom Hansen calls "jentunger" [girls], who were merely fifteen or sixteen years of age.⁸⁰

Marie Lindstedt Cronberg's study of contemporary Sweden indicates similar tendencies. The weaker partner in the relationship, commonly a young woman, could avoid the death sentence. In a case involving a step-father and his step-daughter in 1716, one of the judges at court quoted Mosaic Law as the legal authority for sparing the woman. The Biblical rule, dealing with the rape of a young woman who had been betrothed, was therefore applied in analogy to this case of incest. Even if both the law and the Bible assumed that there were two criminals in cases of incest, the punishment was adjusted according to the circumstances.⁸¹

As Table 5 shows, during the period 1537–1600 a great prevalence of men is evident in cases of incest, mainly in its least serious form, with a relative of the fourth or of an unknown degree. In 7 out of a total of 8 cases, only men were charged. It is conceivable that these cases were dealt with along the same lines of those involving fornication, where the focus of prosecution was also on the men. This interpretation would be in agreement with Terjesen's reasoning for why she finds a preponderance of men in incest cases entailing fines: women who had been virgins at the time of the crime were not charged.⁸² It is also conceivable that the *pater familias*, who as seen earlier could influence whether or not charges were brought against women in cases of adultery and fornication, also enjoyed some influence to this effect in cases of incest when the lovers were not too closely related.

⁸⁰ Hansen, *Bergen lagting*, pp. 182, 187–188.

⁸¹ Marie Lindstedt Cronberg, 'Incest—från brott mot Gud til brott mot barn inom familjen', in *Offer för brott: våldtäkt, incest och barnamord i Sveriges historia från reformationen till nutid*, ed. by Eva Bergenlöv, Marie Lindstedt Cronberg and Eva Österberg (Lund: Nordic Academic Press, 2002), pp. 112–116. In a case from 1716, where a man and his step-daughter were accused of incest, the *hovrätten* finished by sentencing the man to death, while it found exculpation for the young woman, she was small and weak compared to her step-father. She was sentenced to whipping and Church discipline.

⁸² Terjesen, *Blodskam og leiermål*, p. 138.

This chapter has shown that legislation authorised prosecution of men and women for the same type of sexual crimes, both before and after the Reformation. However, in legal practice significantly more men than women were charged for adultery, fornication, and incest during the period 1300 till 1600. This imbalance in the gender distribution is also evident in the following century, although it would be premature to assert that we have here a well-defined development within legal practice. There are variations among the different legal fields, which may however also be due to the vagaries of source-survival.

Legal practice during the period 1300–1600 indicates that many more men than women were punished for adultery, a trend which continued throughout the seventeenth century. During this period, the prevalence of men is most pronounced during the second half of the seventeenth century, but only Telste's study focuses on this. It is impossible to propose a development over centuries with regard to the relationship between men and women who were charged. As Terjesen has shown, within various ten-year-intervals great differences are evident.⁸³ I suggest that the remarkable absence of unfaithful wives in the public registers of fines and punishments cannot be explained by women's lesser propensity to commit adultery, but rather by the fact that husbands could influence whether or not an unfaithful wife should be prosecuted by public authorities.

Much earlier than 1617, laws were issued which criminalised fornication; both men and women were also fined for fornication before that date. There is no evidence for any clear development indicating that relatively more women than men were punished. Telste, for example, finds great variations between ten-year-intervals.

Regarding incest, relatively more men than women were charged during the Middle Ages and the post-Reformation sixteenth century. Yet the preponderance of men here is far less pronounced than in cases of adultery and fornication. The material I analysed shows relatively fewer women charged with incest than the material examined by Terjesen and Telste. Terjesen (for the first half of the seventeenth century) has more men than women charged in cases involving relatives of the second and third degree; Telste (for the second half of the seventeenth century) notes an even distribution between men and women, irrespective of the degree of kinship involved. This indicates that women's liability

⁸³ As discussed above in the subchapter on Adultery.

to prosecution in cases of incest gradually increased, although more detailed studies of the seventeenth century are needed before such a trend can confidently be asserted. One reason why women were far more frequently charged with incest may be that this crime was also to a large degree considered a breach of divine law (see the above discussion on heresy), and not merely of the law of the Crown or the father's and husband's rights.

Yet even if women were less liable than men to be sentenced for a sexual crime, they always risked losing their inheritance to their next-of-kin if they initiated sexual relations or married without the agreement of their guardian. This type of punishment shall be discussed in the following chapter.

CHAPTER NINE

LOSING ONE'S INHERITANCE

This chapter sets out to show that both before and after the Reformation women who engaged in pre-marital sexual relations or who married without the agreement of their guardian risked losing their inheritance. This principle has been discussed by Sogner, Lindstedt Cronberg and Sandvik in connection with seventeenth-century legislation and based on the *Privileges of the Nobility* of 1622 and the *Norwegian Law* of 1687.¹ This legislation is presented as an example of the discriminatory and callous legal concepts engendered during the era of Lutheran orthodoxy. As a basis for an alternative perspective it is important to underscore the continuity of such concepts. Similar rules had already been formulated; the sixteenth century saw the promulgation of, for example the *Kallundborgske Reces* of 1576 and Frederik II's *gårdsrett* of 1562.² Also the *Norwegian Law* of 1604 includes earlier rules regarding the limitation of the right to inherit in connection with the sexual activity of unmarried women or independent marriages.³ The previous sections in question are the *Landslaw's* V 7–7 and article 36 in the *Koldingske Reces* of 1558.⁴ The overview here is not intended to be exhaustive; rather, it shows that in this field, principles which had for the first time been codified during the High Middle Ages continued to be re-formulated later.

According to Absalon Taranger such rules were first codified in the *Book on Inheritance* in the *Landslaw* in 1274 and they were applicable to all women.⁵ In essence, the *Landslaw* states that unmarried women who initiated sexual relations were to lose both their paternal and maternal

¹ Sogner, Lindstedt Cronberg and Sandvik, 'Women in Court', p. 190.

² *Forordninger, Recesser og andre kongelige Breve*, vol. 2, pp. 40–41 § 12, refers to "gårdsret 1562 § 16".

³ *Kong Christian den Fjerdes norske Lovbog af 1604*, IV 7, p. 79.

⁴ *Kong Christian den Fjerdes norske Lovbog af 1604*, p. 78. According to note 2, the section is based on article 36 of the *Koldingske Reces* of 1558, cf. *Forordninger, Recesser og andre kongelige Breve*, vol. 1, pp. 30–31.

⁵ Absalon Taranger in *Magnus Lagabøters landslov*, p. 81 notes that the Danish *Town-law of Ribe*, confirmed by Erik Glipping in 1269, may have inspired the *Landslaw*.

inheritance to their next-of-kin, while women who married without the agreement of their guardian were to lose their entire inheritance to their next-of-kin.⁶ It is conceivable that the first section intended to prevent young women from entering into a relationship that might result in a pregnancy which could, in turn, have provided women with a means to procure marriage with their desired partner against the wishes of their parents.⁷ As Mia Korpiola stresses, the threat of being disinherited was probably a powerful argument which ensured that (most) headstrong daughters reconsidered their options.⁸

Similar principles were introduced almost simultaneously to Danish and Swedish law. In Denmark, this legislation was first introduced in Jutland in 1241. The first such law in Sweden was the *Upplandslaw* of 1296, followed by several Swedish provincial laws. A further overview of what was added, and when, can be found in Korpiola's work.⁹ I agree with interpretations that assert that the origins of such legislation need to have been sought in a common European reaction against the Church's doctrine of consent.¹⁰ In short, this doctrine, which began to influence Norwegian law in the late twelfth century, proclaims that the voluntary consent of the man and the woman who desired to marry was sufficient for the constitution of a valid marriage. Even if the marriage took place clandestinely, the opinion of parents or guardians could not influence matters anymore.

To make matters worse, at least from the point of view of parents or guardians, at the end of the twelfth century divorce was also pro-

⁶ Sexual relations of unmarried women are regulated in L V 7-7, (*NgL*, II, pp. 80-81), *Magnus Lagabøters landslov*, p. 81. The essence of the paragraph is that if a daughter has been slept with at the estate of her father or brother, she is then not entitled to inheritance neither from her father or her mother, but she may be granted mercy as a father would grant her or brother if the father is deceased. If there is no son to inherit, but a son's son with a right of inheritance as previously declared, and a daughter that has not been slept with, then the daughter who has been slept with at her father or brother's estate shall receive half her share. However, if no other heir exists, such as those previously enumerated, she is entitled to the entire inheritance, as though her claim had not been forfeited. Women who married without the consent of father, brother, mother, or the approval of that person who is responsible for her marriage, are dealt with in L V 2-1, (*NgL*, II, p. 75), *Magnus Lagabøters landslov*, p. 73. In essence, the woman has then forfeited all the inheritance that could befall her from that moment and the otherwise nearest to inherit is entitled to that inheritance.

⁷ Korpiola, 'Between Betrothal and Bedding', p. 118.

⁸ Korpiola, 'Between Betrothal and Bedding', p. 117.

⁹ Korpiola, 'Between Betrothal and Bedding', pp. 117-120.

¹⁰ Korpiola, 'Between Betrothal and Bedding', pp. 117-124.

hibited. Some of the oldest Christian laws indicate that divorce was permitted well into the twelfth century. The *Old Christian Law of the Gulathing (Olafstext)* and of the *Old Christian Law of the Borgarthing* show that divorce was possible for a woman who had been abused by her husband in public (including at semi-public festivities and feasts).¹¹ It is possible that the condition of abuse represented a new limitation and that divorce had been more generally granted in pagan times, also for women.¹² The *Magnustext* (1160s) in the *Old Christian Law of the Gulathing* § 54 no longer includes a woman's right to divorce in case of abuse.¹³ An explicit prohibition of divorce was first formulated in the *Canones Nidrosiensis*, Can. 10, in the second half of the twelfth century and men who divorced their wives were to be excommunicated.¹⁴

The principle of voluntary consent in combination with the prohibition of divorce could lead to long-lasting catastrophic consequences for the land-owning classes. In the worst case, such rules meant that families with property to pass on to their descendants lost control of their children's marriages and hence of the land. Based on examinations of the legal situation in Sweden, Korpiola concludes that the principle of parental authorisation was more strictly enforced the higher a family was on the social ladder.¹⁵ Undoubtedly, this was also the case outside Sweden. It is closely linked to questions concerning the transmission of property and the formation of political and economic alliances, where parents and guardians had obvious interests. If such rules were incorporated into the seventeenth-century legislation and addressed to the nobility, this merely confirms previous and repeatedly issued laws. As we shall see shortly, there is evidence surviving from 7 cases

¹¹ G § 54, (NgL, I, p. 29); B II § 8, (NgL, I, pp. 29, 356).

¹² Else Mundal, 'The Double Impact of Christianization for Women in Old Norse Culture', in *Gender and Religion*, ed. by Kari Elisabeth Børresen, Sara Cabibbo and Edith Specht (Roma: Carocci, 2001), pp. 246–247, Else Mundal, 'Den doble verknaden av kristninga for kvinnene i den norrøne kulturen' *Nytt om kvinneforskning* 2 (1999), p. 71.

¹³ G § 54, (NgL, I, p. 29), *The Earliest Norwegian Laws*, pp. 75–76.

¹⁴ Skånland, Vegard, *Det eldste norske provinsialstatutt*, (Oslo: Universitetsforlaget, 1969), pp. 139–142. The wording seems to indicate that the main problem was men who divorced their wives at will and the aim was to stop this practice. However, as Mundal, 'The Double Impact', p. 246 argues, sagas as well as legislation indicate that it was mostly women who made use of the right to divorce.

¹⁵ Korpiola, 'Between Betrothal and Bedding', p. 111. Regarding Danish legal practice, a case which involved two young nobles is discussed by C. T. Engelstoft, 'Brockenhuserne' *Historisk Tidsskrift* [Denmark] Fjerde Række, no. Fjerde Bind (1873–1874), pp. 502–508.

showing that this legislation was consistently implemented during the period 1300–1600.

The first case, dating 1329, concerns a Margrete who defied the will of her rich family when she married a poor man from Lübeck. Yet not all hope for an easy life was lost. In 1329 Margrete reached an agreement with her sister, Åsa, in which the latter granted her parts of her own inheritance.¹⁶ Also other cases indicate that it was not uncommon for parents or siblings to forgive a young woman who had shown inappropriate behaviour regarding her sexuality or marriage.¹⁷ At other times, family reconciliation was impossible, such as in the division of inheritance between two sons and a daughter in Rakkestad in southern Norway in 1487. The second daughter, Gro, was not to receive any part of the inheritance unless she repaid to her parents the 63 marks they had been fined by the king and bishop for an unspecified sexual crime, *leger*, which Gro had committed on the parental farm. The parents announced they would never forgive her for this.¹⁸

Siblings of women who had illegitimate sexual relations deliberately used the legal possibilities available in order to get their hands on their sister's inheritance. Such cases could keep courts busy for years. In April 1572 Dorte Halvardsdatter presented her case to Oslo lawthing. She complained that her brother Hans had retained her part of the parental inheritance. Hans countered that Dorte had lost her right to inherit since she had "allowed herself to have sexual intercourse on her father's estate" (*ladett sig belige vdi sin faders gaardt*). The brother brought two witnesses, who testified that they had visited the father, Halvard Simensen, and asked him whether he would forgive his daughter for her misconduct on his farm. Halvard answered that he would never do so and that he also did not consider her his daughter anymore. Based on these witness statements, the court decided that the part of the inheritance to which Dorte would have had a claim

¹⁶ DN, II, no. 172, pp. 147–148. Should a future husband of Åsa's wish to annul the agreement, he would have to prove that it was at the expense of his wife. In this case, the question of inheritance would be decided according to the law, (*eftir loghum*). The agreement states unambiguously that the interests of the third sister, Ingebjørg, were not to be compromised.

¹⁷ In 1578 an appeal was made to a grandmother's conscience regarding her duty to her grandchild. *Nils Stubs*, p. 159.

¹⁸ DN, X, no. 265, p. 214.

should be given to Hans, “according to law” (*som lougen formelder*).¹⁹ This was, however, not the end of the case. Two more times in 1573, and again in October 1574, a number of witnesses were summoned to the court at Eidsvoll to testify that Halvard and his wife Anne had forgiven their daughter in the end. Unfortunately, the final outcome of this case remains unknown.

Gro's and Dorte's cases are representative of many others, and they show a number of characteristics which are noteworthy. They concern the weight attached to “father's estate”, as well as to the father's pardon, as a deciding factor when determining whether one should have the right to inherit or not. The formulation that the woman had “allowed herself to have sexual intercourse on her father's estate” and the father's pardon as a condition for inheritance are also noted in the *Landslaw*.²⁰ That such significance is attached to the “fathers estate” probably indicates that rules concerning the control over women's sexuality were formulated from a patriarchal perspective, whose primary aim it was to protect the rights of the father, not of the daughter. The stress on “father's estate” may betray some influence from Gratian, who in this case seems to have been inspired by older Germanic law. When Gratian discusses the term “father's estate” in similar constellations—whether the woman was abducted from her home, or whether she consented voluntarily—aspects of the act, other than the purely sexual ones, play a role. Katryn Gravdal argues that Gratian here incorporates elements from older Germanic law where *raptus* was defined as a crime against a man's property, and not primarily as a crime against the woman.²¹

The significance attached to the pardon shows that it was not a decision of the public authorities whether or not a woman was to lose her inheritance. Rather, this was determined by her closest relatives.

¹⁹ Nils Stubs, pp. 9–10. Reference is made to “gifftings bolckenn 2 Cap: och j arf-fuetallitt j Cap”, meaning the *Landslaw*, the *Book on Matrimony*, 2nd chapter and the *Book on Inheritance*, 1st chapter.

²⁰ L V 7–7, (NgL, II, p. 81), *Magnus Lagaböters landslov*, p. 81.

²¹ According to Gravdal, *Ravishing Maidens*, pp. 8–9 the main aim of medieval legislation on *raptus* was to ensure peace between men. Twelfth-century canon law on *raptus*, greatly indebted to Gratian, made important changes. *Raptus* was also an illegal sexual act because it was morally unacceptable. Gravdal sums up the following main points: an illegal sexual act had taken place; the woman had been abducted from her father's house; the sexual act had been achieved through violence; there had been no previous agreement on marriage between the victim and the rapist. Many canonists accepted Gratian's ideas, and after centuries of controversy, they returned to concepts taken from Germanic law with its focus on the rights of the *pater familias*.

In this respect, the legislation corresponds to the laws which grant the *pater familias* the decision to pardon a woman or to let her face the public authorities, as discussed above in the cases of adultery and fornication.

CHAPTER TEN

SEXUAL CRIMES AS A FUNCTION OF MARRIAGE: LUTHERISM OR CHRISTIANITY?

The aim of this chapter is to disprove the common assertion that the status of marriage was greatly enhanced after the Reformation. Amongst historians of the Early Modern Period this assumption has been a central premise, supporting the claim that women who had extramarital sexual relations were increasingly denigrated compared to the situation in the Middle Ages.¹ Because of this connection between extramarital sexuality and the status of marriage after the Reformation, it is necessary to discuss some aspects of the legislation concerning marriage, although marriage law as such is not a subject of this work.² Legislation introduced after the Reformation has been presented as a novelty to a much greater degree than is justified. In the following I shall emphasise the similarities between medieval and post-Reformation principles with regard to entering and ending betrothals and marriages.

The Church decree, of 1539, rules that a marriage cannot be validated against the guardians' wishes and without earlier publication of the banns in church.³ From the 1550s on, the wedding ceremony had to take place in church in order to ratify a legal marriage. This is stated in the decrees of 1555, 1565 and 1573, issued in the dioceses of, respectively, Oslo and Hamar, the fief of Bergenhus, and the diocese of Stavanger.⁴ Also the Danish decree on marriage of 1582 and which was declared applicable to Norway in 1589 has similar rules. A betrothal was to be made in front of the priest and in the presence of five witnesses; the

¹ Sogner, Lindstedt Cronberg and Sandvik, 'Women in Court', pp. 182–183, 191; Telste, *Mellom liv og lov*, pp. 61–62; Terjesen, *Blodskam og leiermål*, pp. 34–39; Bastiansen, 'Væ dig Bergen', pp. 26–27.

² Hanne Marie Johansen, *Separasjon og skilsmisse i Norge 1536–1909: En familie- og rettshistorisk studie* (Oslo: Den norske historiske forening, 2001), pp. 47–49 shortly discusses the "catholic background" but because she focuses on divorce, she does not discuss regulations on for example publishing the banns which are enacted in the younger Christian laws.

³ *Lover og forordninger 1537–1605*, p. 14.

⁴ Telste, *Mellom liv og lov*, p. 61–62, 68–69; Sogner *Krig og fred*, p. 209.

banns were to be read on three consecutive Sundays and the wedding ceremony was to take place in church.⁵

It has been argued that marriage laws issued during the post-Reformation sixteenth century had two main aims. Firstly, it was imperative to put an end to clandestine betrothals and marriages. The second aim, to a certain extent a spin-off of the first, was to establish a simpler and more consistent regulatory framework to define what constituted a valid marriage.⁶ There can be no doubt that the implications of the doctrine of consent ensured a significant potential for conflict, even when looking beyond the parental lack of control discussed in the previous chapter. A marriage, if contracted in secret, could also cause conflict in regards to incest and bigamy, as well as raise questions of whether a marriage had in fact taken place at all. Brundage notes that medieval European ecclesiastical courts had to deal with a large number of cases where men who only sought casual sex had promised marriage to women without the intention of honouring that promise.⁷ Records of several cases brought before the court, also including such rash promises, have survived from the diocese of Bergen from the first half of the fourteenth century. We have a detailed description of a case from 1325, raised by Domhild against Eirik.⁸ Eirik wanted to lie with Domhild at an inn in Bergen but she would only consent if he promised to marry her. Later, Eirik denied that he had made such a promise, although in vain. Based on the statements of two other women Bishop Audfinn concluded that a binding voluntary plight of troth had been made, and that a valid marriage had therefore been concluded. Eirik had voluntarily promised to marry Domhild, and the marriage had been consummated immediately afterwards, an act which *ipso facto* rendered it valid.

The introduction of a less ambiguous marriage law during the sixteenth century aimed at avoiding court cases such as that of Domhild versus Eirik. Yet contrary to the proposals of a number of scholars, this

⁵ *Lover og forordninger 1537–1605*, pp. 218–219.

⁶ Terjesen, *Blodskam og leiermål*, pp. 35–36.

⁷ Brundage, *Law, Sex, and Christian Society*, pp. 436, 440–443.

⁸ *DN*, V, no. 72, pp. 65–66. Other cases in this category include *DN*, IV, no. 175, pp. 159–160 from 1329. Four judgements made by the bishop of Bergen during visitations in 1308 and 1309 are extant. *DN*, X, no. 7, p. 14; *DN*, X, no. 8, p. 14; *DN*, III, no. 82, p. 87; *DN*, III, no. 83, pp. 87–88. The last case concerned a woman who had lived with another man for a long time, but according to the Bishop's judgement this relationship was illegal. The survival of these cases from this period is due to chance; the so-called *Registrum* a copy of the correspondence of the Bishops of Bergen from the first half of the fourteenth century has been preserved.

new legislation should not be used to infer a rather indifferent attitude to the institution marriage in medieval Norway.⁹ One exception is Sogner, who in *Aschehougs Norgeshistorie* of 1996 states that publication of the banns and public plight of troth in front of witnesses had been known since the High Middle Ages.¹⁰ Yet this view has not been followed by other scholars of the Early Modern Period. It is therefore important to stress that legislation focusing on publicity and establishing a consistent framework, was in no way specifically Lutheran, and that there is much continuity in regards to important principles of medieval marriage law.

In a study by Thomas Max Safely on the application of canon law in marriage courts in protestant Swiss towns during the first half of the sixteenth century, one important conclusion is that “the originality of publicity of marriages as required by the Protestants must not be over-estimated”.¹¹ Safely points out that for example Pope Alexander III (1159–81) decreed the failure to publish the banns in Church as *scelus*, that is, as a sin and a crime.¹² The Reformation did not lead to significant changes in marriage law; what we see instead is an “evolution” rather than a “revolution”.¹³ This is an important point to remember when we turn to the discussion of Norwegian marriage law.

The rules on marriage as they appear in the younger Christian laws and in *Archbishop Jon's Christian Law* do not merely prescribe the consent of free will.¹⁴ These rules also state clearly that the intended marriage was to be publicly announced in the parish church on the three consecutive Sundays before the wedding. This enabled those who may have known something which could have spoken against the marriage to come forth.¹⁵ The same principles are also found in several

⁹ Terjesen, *Blodskam og leiermål*, pp. 34–39; Bastiansen, ‘Væ dig Bergen’, pp. 26–27; *Rettslig regulering av homoseksuell praksis*, pp. 14–15; Telste, *Mellom liv og lov*, pp. 60–62; Sogner, Lindstedt Cronberg and Sandvik, ‘Women in Court’, pp. 182–183.

¹⁰ Sogner *Krig og fred*, p. 209.

¹¹ Thomas Max Safely, ‘Canon Law and Swiss Reform: Legal Theory and Practice in the Marital Courts of Zurich, Bern, Basel, and St. Gall’, in *Canon Law in Protestant Lands*, p. 195.

¹² Safely, ‘Canon Law and Swiss Reform’, pp. 190–197. Safely dates for example the oldest surviving decree prohibiting clandestine marriage in Bern to 1361.

¹³ Safely, ‘Canon Law and Swiss Reform’, p. 190.

¹⁴ *KL*, XX, p. 483; Gunnes, *Erkebiskop Øystein*, p. 160. It is explicitly forbidden for a man to marry a woman by force. NB § 15 (*NgL*, II, pp. 299–300); NG § 23, (*NgL*, II, pp. 318–319); J § 40, (*NgL*, II, pp. 367–368); NB II § 19, (*NgL*, IV, p. 172).

¹⁵ For example the section on marriage in NG § 23, (*NgL*, II, p. 319); J § 42, (*NgL*, II, pp. 369–370); NB II § 19, (*NgL*, IV, p. 172).

provincial statutes of the late thirteenth and fourteenth centuries, issued by Archbishops Jørund, Eilif and Arne.¹⁶ The principle of publicity was made known throughout the Church province. In 1912 Bull notes that the Church took a negative view of clandestine marriages. Amongst others, he refers to an Episcopal statute from 1327 in Iceland which in fact prescribes the same penance for a betrothal in secret *launfesting*, as for adultery. Other Icelandic bishops decreed strict penance for clandestine marriages; in 1345 Jon Sigurdsson of Skálholt prescribed the same penance for this as for incest with relatives of the fourth degree. This clearly shows that also in the Middle Ages clandestine betrothal and marriage were considered undesirable and forbidden.¹⁷ Additional evidence for this view can be presented. *Árna saga byskups* [the saga of bishop Arne] notes a letter which Archbishop Jon Raude sent to Iceland in 1269. Among other things, it orders the banns to be published in Church three times before the wedding.¹⁸ Jon's and Arne's Christian laws state this principle and refer to patristic and divine law (*hælgum fæðrum* and *guðs logum*) as the authority when forbidding clandestine marriage.¹⁹ According to *Archbishop Jon's Christian Law* those who entered their marriage in secret had to each pay a fine of twelve oras to the bishop. As a comparison it may be noted that this is the same amount as the fine that was demanded by *Archbishop Jon's Christian Law* for simple adultery.²⁰ Also Archbishop Olaf's provincial statute of 1351 rules similarly. In addition, it orders serious punishments for ecclesiastics who colluded in the conclusion of a clandestine marriage: at least a three years' suspension from office, and if necessary an unspecified but even harsher sentence.²¹ *Archbishop Jon's Christian Law* also orders that the wedding ceremony is to take place in church, although it does not impose any sanctions on those who fail this obligation.²² Marriage in church was therefore not a novel demand when

¹⁶ Jørund's first statute of 1290, (NgL, III, p. 243); Eilif's third, (NgL, III, p. 252); Arne's, (NgL, III, p. 296).

¹⁷ Bull, *Folk og kirke i middelalderen*, p. 151.

¹⁸ *Biskupa sögur III*, ed. by Guðrún Ása Grímsdóttir Íslenzk fornrit, 17 (Reykjavík: Hið Íslenska fornritafélag, 1998), p. 16.

¹⁹ J § 42, (NgL, II, pp. 369–370); A § 23, (NgL, V, pp. 36–38), see in particular p. 37.

²⁰ J § 44, (NgL, II, p. 371).

²¹ Bull, *Folk og kirke i middelalderen*, p. 150–151, (NgL, III, pp. 301–306). Translation (Norwegian) in Trygve Lysaker, 'Den norske kirkeprovins i svartedaudens kjølvann. Erkebiskop Olavs provinsialstatutt av 1351', in *Kongsmenn og krossmenn. Festskrift til Grethe Authen Blom*, ed. by Steinar Supphellen (Trondheim: Tapir, 1992), p. 228.

²² KL, XX, p. 494, J § 41, (NgL, II, p. 369).

introduced to Norwegian law after the 1550s. Both ecclesiastical and secular authorities, as well as obviously the guardians of the unmarried couple, valued a public betrothal and marriage. The bridegroom was to obtain the consent of the woman's parents, the woman's agreement, and then publicly declare himself betrothed in front of witnesses. According to the *Landslaw's* unambiguous wording, the father and mother were to have control over their daughters' marriage.²³

Ecclesiastical and secular opinion was not necessarily at variance. It is interesting to note that even at the very pinnacle of the Norwegian ecclesiastical hierarchy we find a certain ambivalence regarding the doctrine of consent. Inger Holtan document that legal thinking which also attaches significance to the consent of parents or guardians can be traced to the writings of some high medieval archbishops, for example those of Eirik Ivarsson in 1189 and of Jon almost a century later.²⁴ However as a general principle, a marriage which took place without the prior publication of the banns and without a Church ceremony was never considered invalid by the Church.

According to canon law, marriage was a sacrament, indissoluble as long as the partners lived. A marriage could of course be annulled, but only if it was in breach of canon law, which considered factors such as coercion, incest and impotence. Incidentally, the fact that divorce became available again after the Reformation is at odds with claims that the institution of marriage was strengthened at that time, compared to the Middle Ages.

The Church decrees of 1537 and 1539 do not contain any rules on divorce proceedings, annulment of marriage, or cancellation of a betrothal. The lack of guidelines led to varying court practices which differed from town to town, with diverse outcomes for similar cases. In 1579, the king therefore initiated the creation of a protestant marriage law for Denmark and Norway. This was made valid for Denmark in 1582 and Norway in 1589.²⁵

The decree on marriage of 1589, lists three main justifications for granting a divorce in court: adultery, desertion, and impotence. Both the catholic prohibition of and Luther's view on divorce are based on Matthew 19:9: "I tell you, if a man divorces his wife for any cause

²³ L V I, (NgL, II, p. 74), *Magnus Lagabøters landslov*, p. 72.

²⁴ Holtan, *Ekteskap, frillelevnad og hor*, p. 21. See *RegNorv*, I, no. 196, p. 85. J § 40, (NgL, II, p. 368).

²⁵ Johansen, *Separasjon og skilsmisse*, pp. 52–53.

other than unchastity, and marries another, he commits adultery". In the catholic interpretation, the formulation "for any cause other than unchastity" was a later addition which had not been included in the original, and therefore adultery did not authorise a divorce. By contrast, Luther interpreted this quote literally. A divorce was not to be granted if the person who initiated proceedings had committed adultery him- or herself. In addition, a man forfeited his right to obtain a divorce if he had sexual relations with his wife after he became aware of her unfaithfulness. Before the decree on marriage of 1589 adultery was behind virtually all cases of divorce.²⁶ *Desertio* became the most common reason for divorce in the seventeenth and eighteenth century, and the majority of these cases were initiated by women, who often had been left in poverty when their husbands left.²⁷

From the late twelfth century separation was possible in cases of adultery, but not divorce. The younger Christian laws explicitly point this out: "skil þo æighi hordomr hiunskapin".²⁸ When separation took place, this had practical and economic consequences. The *Young Christian Law of the Borgarthing I*, from c. 1250 and the *Young Christian Law of the Borgarthing II* from 1267/68 contain procedures regarding the division of the estate.²⁹ It is interesting to note that with only slight changes, this rule is actually based upon a paragraph "Concerning Divorce" (*Um hjona skilnadð*) in the *Old Christian Law of the Borgarthing*. This latter ruled stemmed from a period during the earlier Middle Ages when divorce was legal.³⁰ I have however, not come across any evidence from legal practice which can tell how these rules were applied in cases of separation.

According to the decree on marriage of 1589, impotence was not a reason for divorce if it occurred *after* the marriage had been established.³¹ It was then considered a yoke the couple had to bear. According to Hanne Marie Johansen it was probably included here because of Luther's view that a marriage which was not consummated could be

²⁶ Johansen, *Separasjon og skilsmisse*, p. 148.

²⁷ Johansen, *Separasjon og skilsmisse*, pp. 145–146.

²⁸ NB I § 18, (*NgL*, II, p. 301); cf NG § 26, (*NgL*, II, p. 320); NB II § 22, (*NgL*, IV, p. 173).

²⁹ NB I § 26, (*NgL*, II, p. 26); NB II § 32, (*NgL*, IV, p. 178).

³⁰ B II § 9, (*NgL*, I, p. 356) cf NB I § 26, (*NgL*, II, p. 305); NB II § 32, (*NgL*, IV, p. 178). I have not found parallels to this rule in the Christian laws from the other provinces.

³¹ *Lover og forordninger 1537–1605*, p. 221.

terminated by divorce.³² If the impotence had occurred already before the wedding, procedures were to stall for three years before divorce was possible. Johansen argues that impotence was probably not a common reason for divorce after the Reformation, only one case is noted for Bergen for the seventeenth century.³³

As for the Middle Ages, a fragment of the *Old Christian Law of the Borgarthing* shows that ideas that impotence could have an effect on marriage were not entirely unknown. Here impotence, (*horundfall*), is listed as a valid reason to cancel a *promise* of marriage. This is the only extant evidence and no cases have survived from medieval Norway. Therefore it is difficult to say when this criterion was introduced to Norwegian law, and to what extent it was applied in practice.³⁴ Studies of areas having richer sources—a general overview by James A. Brundage, as well as late medieval cases from England and France, Ruth Mazo Karras' study of England, and Guido Ruggiero's of Italy—discovered that impotence was from time to time invoked in the attempt to have a marriage annulled.³⁵ Canon law decreed that "women of good opinion, worthy of faith, and expert in the works of marriage" should undertake the actual inspection. In practice, prostitutes were frequently called in to examine men's genitalia.³⁶ An unusually well-documented case from Venice in the 1470s involves a Nicolò who had relations with two prostitutes in a row, something he himself initiated. His aim was to disprove his wife's claim that he was incapable of fulfilling his marital duties. The cohabitations took place in the presence of a priest, a scribe, and other witnesses! Nicolò proved to be quite potent, something his

³² Johansen, *Separasjon og skilsmisse*, p. 54.

³³ Johansen, *Separasjon og skilsmisse*, pp. 54, 149–150.

³⁴ The most thorough discussion of the Norwegian material is by Vilhelm Møller-Christensen, *KL VII*, 'Impotens', p. 368. The information is found in a fragment of a manuscript published as a supplement to B II in *NgL*, IV, p. 68. "*vm kuena gifting. þat ma madr ængi riufa nema med iii lutum þat er æit ef annan huart fær vitfiring eda harund fall eda brotfall [...]*. Gustav Storm, *NgL*, IV, p. XII, was able to decipher and complete the text where the publishers of *NgL*, I, pp. 353–363 only managed to read individual words. According to *NgL*, IV, p. 607 the manuscript (AM. 31 octavo) dates from the mid-fourteenth century or a little earlier, 1320–40. *Bishop Arne's Christian Law* stipulates that a man who is impotent, *sinfallin*, shall not be allowed to marry. Møller-Christensen notes that *sinfallin* is a compound; *sin* means penis while *fallin* from *falla*, fall. *NgL*, V, p. 38.

³⁵ James A. Brundage, 'The Problem of Impotence', in *Sexual Practices*, pp. 135–140.

³⁶ Karras, *Common women*, pp. 97–98.

wife had denied after seven years of marriage.³⁷ Considering Nicolò's well-documented exertions it is doubtful that his wife obtained the desired annulment.

The rules on the cancellation of betrothal in the decree on marriage of 1589 are for the most part the same as the justifications for granting a divorce; infectious disease was an additional reason to ask for a cancellation of betrothal. In the Middle Ages, a betrothal bound both partners and in order for the betrothal to be valid consent was a prerequisite.³⁸ According to the younger Christian laws, Church decrees and the decree of 1392, withdrawing from a valid betrothal while the other person was still alive could lead to outlawry.³⁹ I have only found evidence of one case from medieval Norway, from 1478, where a betrothal was annulled. Ragnhild Thoresdatter brought her case to court in order to annul her betrothal. Her fiancé had betrothed her with "insincerity and falsehood" (*falsk og swik*), fled the country like a thief (it does not say for how long), and no-one knew whether he was alive or dead. The bishop consented to the annulment.⁴⁰ Based on the far more comprehensive late medieval Swedish source material, Korpiola concludes that the annulment of betrothals was one of the most common types of cases brought before ecclesiastical courts. As long as there was no clear indication that the betrothed had had sexual relations it was relatively easy to annul betrothals in late medieval Sweden. This practice also continued after the Reformation; Korpiola refers to it as "business as usual".⁴¹

According to the decree of 1589, another valid reason to annul a betrothal was if one of the betrothed had lain with a close relative of his or her partner.⁴² A similar regulation also existed during the Middle

³⁷ Ruggiero, *The Boundaries of Eros*, pp. 146–147.

³⁸ *KL*, IV, pp. 235–236; cf *KL*, XV, pp. 507–508.

³⁹ J § 40, (*NgL*, II, pp. 368–369); Eiliv's fourth statute of 1327 (*NgL*, III, p. 274); decree of 1392 (*NgL*, 2rk, I, p. 23). According to the younger Christian laws, no man was to become betrothed to a woman whose (first) fiancé was alive. NB § 17, (*NgL*, II, p. 301); NG § 25, (*NgL*, II, p. 320). A similar principle can be found in older legislation, G § 51, (*NgL*, I, pp. 27–28) threatened outlawry for a fiancé who resisted marriage for longer than twelve months, and for a person who married the fiancé of another.

⁴⁰ *DN*, I, no. 923, p. 664. Generally, marriage was to follow within a year of the betrothal. If a fiancé went abroad before that, a dispensation of up to three years was possible. Obviously, if the fiancé was deceased, nothing stood in the way of his erstwhile fiancée marrying another man.

⁴¹ Korpiola, 'Between Betrothal and Bedding', pp. 134, 236.

⁴² *Lover og forordninger 1537–1605*, p. 219.

Ages, in law as well as in legal practice.⁴³ In a case from the early fourteenth century Torstein complained to Bishop Arne of Bergen that the fiancé of his sister Tora refused to move in with her, even after a betrothal of two years.⁴⁴ The reason the fiancé, Tore, gave for his refusal was that he had had sexual relations with Steinvor before his betrothal to Tora; Steinvor was a relative of the latter.⁴⁵ Since it was Tore himself who ventured this information it appears he had got cold feet regarding his marriage to Tora. Tore risked penance and fines if his claims regarding Steinvor were proven correct. If it could be established that Tore had had such a relationship before he was betrothed to Tora, the regulations on impediments to marriage in the Christian laws, in this case incest, would prohibit the marriage between him and Tora from taking place.⁴⁶ If Tore's relationship began after his betrothal, it would not have constituted a reason to end the betrothal.⁴⁷ The outcome of this case is unfortunately not recorded, so the question of whether the betrothal was annulled or not remains open. Yet the case shows that the population was aware of the legal possibilities to end betrothals and the thorough examination which Bishop Arne ordered shows that such cases were taken very seriously.

Regarding the Norwegian Middle Ages it is impossible to assess to what extent betrothal or marriages were annulled, legal practice is fragmented and scattered and no systematic study on this issues has yet been undertaken.

⁴³ NB § 17, (*NgL*, II, p. 301); NG § 25, (*NgL*, II, p. 320) names near kinship as an impediment to marriage.

⁴⁴ *DN*, VII, no. 30, pp. 27–28 [1305] and *DN*, IV, no. 62, p. 66 [1306].

⁴⁵ The *Old Christian Law of the Frostathing* and the younger Christian laws allowed separation in case of adultery, but not remarriage. F III § 7, (*NgL*, I, p. 150); NB I § 18, (*NgL*, II, p. 301); NG § 26, (*NgL*, II, p. 320); NB II § 22, (*NgL*, IV, p. 173). The younger Christian laws and Archbishop Pål's third statute say explicitly that divorce was not possible because of a spiritual kinship which was established after marriage. It was not unknown for laymen (whether they were biological relatives, in-laws, or spiritual kin) to use ecclesiastical marriage law in order to obtain a divorce for a marriage which no longer met expectations. Brundage, *Law, Sex, and Christian Society*, p. 193 discusses in particular the so-called "law of consanguinity" as a "two-edged weapon".

⁴⁶ NB § 17, (*NgL*, II, p. 301); NG § 25, (*NgL*, II, p. 320) name near kinship as an impediment to marriage.

⁴⁷ In a similar case from 1306, *DN*, VIII, no. 17, pp. 28–29, Eirik desired marriage with his fiancée, but her relatives objected because of rumours of a relationship between Eirik and his maternal aunt.

This chapter has argued against the claim that the Reformation replaced medieval principles with a radical re-valuation and idealisation of marriage. Consequently we can also dismiss the assertion that women who had pre- or extramarital sexual relations suffered more criminal prosecution after the Reformation than during the Middle Ages. The supposedly enhanced status of marriage after the Reformation has also been an important premise for the claim of a more general criminalisation of adultery and correspondingly more severe punishments for men and women; both of these arguments have been discarded in Parts A and B of this work.

However, there are still reasons to view the criminalisation of extramarital sexuality as a by-product of marriage, as shown by high medieval sources.⁴⁸ As Gunnes stresses, from the late twelfth century new principles concerning sexuality and marriage were incorporated into the *Old Christian Law of the Frostathing*.⁴⁹ I fully agree with the further chronological development as outlined by Handeland, where she argues that the Church's view that sexuality was to occur exclusively within marriage dominated legislation more and more from the second half of the thirteenth century.⁵⁰ Country-wide legislation prohibited all forms of extramarital sexuality after approximately 1250. This legislation criminalised both women and men who engaged in extramarital sexuality. In this area, the Reformation did not lead to any greater amounts of persecution.

Also in the Middle Ages it was imperative to ensure, as much as possible, a great deal of publicity around betrothals and marriages. To this end numerous regulations were issued in secular laws, Christian laws, and Church statutes and to a large extent the post-Reformation legislation incorporated these regulations.

It is outside the scope of this work on sexual crimes to examine in detail the application of marriage law during the Middle Ages and the Early Modern Period. Yet there are indications of a certain continuity, at least in some areas. Sogner argues that as late as the eighteenth century the requirement of publishing the banns before an intended marriage had not yet gained popular acceptance. Indeed, people con-

⁴⁸ Sogner, Lindstedt Cronberg and Sandvik, 'Women in Court', p. 183.

⁴⁹ Gunnes, *Erkebiskop Øystein*, pp. 156–162.

⁵⁰ Handeland, 'I lyst og last', p. 112.

tinued to move in together before marriage.⁵¹ This behaviour finds medieval parallels. In spite of repeatedly issued laws by ecclesiastical and secular authorities enjoining that betrothals and marriages were to be announced publicly, the surviving evidence shows that these rules were not necessarily adhered to in practice.

⁵¹ Sogner *Krig og fred*, p. 209; Telste, *Mellom liv og lov*, p. 72.

CHAPTER ELEVEN

GENDER DIFFERENCES

This part of the work has commented on whether laws against sexual crimes issued after the Reformation had particularly negative consequences for women, compared to the state of affairs during the Middle Ages. Both criminal and civil law aspects have been discussed. I dismiss the traditional claim of a major break at the time of the Reformation, preferring to emphasise the continuity between the medieval and the post-Reformation legal situation instead. This is also true in regards to legal practice.

The Christian laws show that women were criminalized for the whole spectrum of extramarital sexuality during the Middle Ages. The claim that this development only took off in earnest after the Reformation can therefore no longer be maintained. No new aspects of sexuality were criminalised for the first time after the Reformation.

The earliest secular laws show that in the pre-Christian period and Early Middle Ages sexuality was predominantly considered a matter of civil law. If a man lay with a free man's close female relative sanctions were directed against the male partner only. This was mainly in the form of a revenge killing, which was considered the most honourable conclusion for the offended party of this type of case. Alternatively the lover might pay compensation to the woman's family. Studies of the Family Sagas illustrate that women were never blamed, even when they had obviously committed adultery.¹ Preben Meulengracht Sørensen points out that drastic forms of punishments such as the killing and mutilation of women who led an inappropriate sexual life, are unknown from the sagas and the Norwegian and Icelandic laws.² The present work has from time to time drawn comparisons with Swedish

¹ Preben Meulengracht Sørensen, *Fortælling og ære: Studier i islændingesagaerne* (Aarhus: Aarhus universitetsforlag, 1993), pp. 235–236. See also Jesse L. Byock, *Feud in the Icelandic saga* (Berkeley: University of California Press, 1982), pp. 235–238 who discusses episodes from the Icelandic Sagas.

² Even if Sørensen, *Fortælling og ære*, pp. 235–236 bases himself mainly on Icelandic sources, Norwegian and Icelandic legislation share the same principles here: it was the male lover who faced punishment.

and Danish law, and in regards to this it is necessary to point out the existence of the differences between the countries. In Sweden, the man's power as head of the family included his right to punish a wife who had committed adultery, either by banishing or killing her. The Danish regional laws contain similar regulations. Only the Swedish laws of Göta are an exception, here the husband did not have the right to kill a guilty wife. It is possible that these laws were influenced by western Norwegian legislation.³

There is however, an important social dimension to this oldest surviving legislation on sexuality. Free women who had sexual relations with slaves were held legally responsible.⁴ In essence the law implies that if an unmarried woman gave birth to a child without naming the father, the father was assumed to be a slave. The woman had then "laid herself to a fine of three marks, in the king's farm"; she probably lost her freedom temporarily until she had done the required forced labour and paid the fine. In many ways the traditional gender roles are turned upside down in this situation; the free woman is considered the active and criminal part, the male slave a sex-object. Free women who initiated sexual relations with socially higher-ranking men were, as numerous saga-episodes bear witness to, quite a common phenomenon and this was not necessarily socially stigmatising either. By contrast, social hierarchy was upset when free women lay with slaves. Similar legislation was also a common feature of early Germanic law.⁵

From a gender perspective it is necessary to stress that the criminalisation of sexuality was not static during the Middle Ages. Until the mid-thirteenth century a development can be witnessed in which

³ These rules have been discussed by Grethe Jacobsen, 'Sexual Irregularities in Medieval Scandinavia', in *Sexual Practices*, pp. 72–85; Grethe Jacobsen, 'Ændrede kvinders stilling sig ved overgangen til kristendom i Norden?' in *Förändringar i kvinnors villkor under medeltiden: Uppsatser framlagda vid ett kvinnohistoriskt symposium i Skalholt, Island, 22.–25. juni 1981*, ed. by Silja Atalsteinsdóttir and Helgi Þorláksson (Reykjavik, 1983). See also *KL*, XX, 'Ægteskabsbrud', p. 501 (Denmark) and pp. 503–506 (Sweden).

⁴ B II § 14, (*NgL*, I, p. 358); G § 198, (*NgL*, I, p. 70); F II § 1, (*NgL*, I, pp. 130–131). As Knut Robberstad, *Gulatingsslovi* (Oslo: Det Norske Samlaget 1981), p. 377 (in the additional notes to the fourth edition of the *Gulatingsslovi*) and Iversen, *Trelldommen*, p. 109 underlines that *Fagrskinna's* description of free women who have children with slaves and its rule that they have to pay a fine to the king show tangible similarities with a corresponding regulation surviving in three of our regional laws.

⁵ Katherine Fischer Drew, *Law and Society in Early Medieval Europe: Studies in Legal History*, (London: Variorum Reprints, 1988), see especially part V, The Germanic Family of the *Leges Burgundionum*, p. 13 and part VII, The Family in Visigothic Law, p. 7.

various sexual acts as well as marital sexuality during certain times of the year were successively criminalised. In all likelihood, the Church's view of extramarital sexuality as a sin was decisive here. Gradually, women came to be criminally responsible in the same way as men. The *Old Christian Law of the Gulathing* § 25 defines bigamy mainly as a crime committed by men.⁶ Regarding incest, the earliest Christian laws prosecute exclusively the man who is threatened with outlawry. It is the male partner who forfeits property and peace, and who has to go into exile. This is in direct contradiction to the younger Christian laws, where both partners are prosecuted. For cases of incest the point of departure within the younger Christian laws is the man, where the laws list the women with whom men are forbidden to have sexual relations with or to enter into marriage with; if they choose to do so, the consequences are outlawry. Yet it is unequivocally stated that both partners (*pau badhe*), were to be punished.⁷ From the oldest Christian laws to the *Norwegian Law* of 1687, bestiality and homosexuality are exclusively defined as crimes committed by men. Concerning adultery, the younger Christian laws take on the principle of equality for men and women in criminal law, with the exception of one regulation in which the elopement with married women exclusively criminalises men. The tendency described here supports Mundal's, Steinsland's and Meulengracht Sørensen's views of a gradual deterioration of the position of women in sexual matters after the introduction of Christianity.⁸

There is a development in the legislation regulating sexuality, from it having initially civil law consequences directed exclusively against men, to finally criminal prosecution of both men and women as sinful and criminal individuals. There are obvious parallels to the legal development described by Early Modern historians for the period after the Reformation. Consequently, it is again possible to show that

⁶ (NgL, I, p. 16), *The Earliest Norwegian Laws*, pp. 54–55. If a man had concluded valid marriages with two women (through *mund* and agreement) he was to divorce his second wife. The man had to pay a fine of three marks to the bishop and to do penance. However, if his relationship with the second woman continued they were both banished from the kingdom and both had their property confiscated. If a man had an unfree woman as a concubine, he had to pay a fine of one-and-a-half marks to the bishop and do penance.

⁷ NB II § 26, (NgL, IV, p. 175); NB I § 22, (NgL, II, pp. 302–303); NG § 26, (NgL, II, p. 335).

⁸ Mundal, 'The Double Impact', pp. 237–253, which also refers to previous studies by Mundal, Gro Steinsland and Preben Meulengracht Sørensen, *Menneske og makter i vikingenes verden* (Oslo: Universitetsforlaget, 1994), *passim*.

important changes which are commonly linked to the Reformation in reality occurred during the Middle Ages.

Although legislation from the High Middle Ages through the seventeenth century are characterised by the principle that men and women were equal in the eyes of criminal law with regard to sexuality, legal practice in actuality was different. It was first and foremost men who were prosecuted for sexual crimes in the Middle Ages, in the post-Reformation sixteenth century, and in the seventeenth century.

Although it was predominantly men who were accused of and sentenced for adultery, it should not necessarily be assumed that these numbers correspond equally to the numbers of men and women who in fact committed adultery. I remain unconvinced that married women were so much less likely to commit adultery than married men. The most likely explanation for these “missing women” in the criminal records probably is the fact that it was at the discretion of the cuckolded husbands to decide whether or not to bring charges against their wives. This explanation may also account for the fact that fewer unmarried women than unmarried men were charged for fornication. In these cases, the woman’s father, or the head of family where the woman might be in service, could influence whether she was to be charged or not.

The imbalance in the actual application of the gender neutral legislation is not as obvious with regard to incest. During the period 1300–1600 we note a preponderance of men, but their dominance here is less than it is in cases of adultery and by the seventeenth century it appears that the more serious the case of incest, the more likely it was that the woman was charged. It is conceivable that incest was considered more of a crime against God and the public authorities since they were God’s representatives on earth than a crime against husbands and fathers.

An important aspect of the civil law side of sexuality was that women who initiated an illegitimate sexual relationship or who married without obtaining their guardian’s consent risked losing their inheritance to their closest relative. The *Landslaw* introduced such regulations, applicable to all women, to Norwegian law in 1274. This legislation probably was part of a common European reaction by the land-owning classes against the teachings of the Catholic Church that stated that a valid marriage was constituted merely by the consent of the two partners and that the consent of the parents and guardians was unnecessary. Sexual relations initiated by unmarried women were also covered by this legislation, in all likelihood to prevent a possible pregnancy from being used to

force a marriage to an “unacceptable” man. Legal practice from the late medieval period and the post-Reformation sixteenth century shows that these sections of the law were widely known. The incorporation of these principles into legislation throughout the seventeenth century merely indicates that these laws continued to be important.

It has been necessary to discuss marriage law, since it has been claimed that an enhanced status of marriage after the Reformation implied that women who had extramarital sex were in a far worse situation than during the Middle Ages. I agree with the view that sexual crimes are, on the whole, a function of marriage and that the regulation of extramarital sex can be perceived as a regulation of marriage.⁹ By contrast, I disagree with the hypothesis that medieval legislation reflects a relaxed attitude towards marriage during the Middle Ages. Research on illegal sexuality after the Reformation has drawn an over-simplified representation of medieval marriage law. Because of this, post-Reformation legislation has to a far greater degree than is warranted been presented as being something new. Consequently, I also have to dismiss the claim that women who had extramarital sexual relations after the Reformation were significantly worse off than their sisters during the Middle Ages.

Women who engaged in illegal sexual acts were however subjected to other forms of sanctions in the form of visible symbols and rituals; men were spared these humiliations. Both before and after the Reformation, there were laws which stipulated different dress-codes in order to distinguish between the honourable and the “loose” women.¹⁰ Another highly symbolic sanction was the ceremony of “churching”, leading women back into the Church after they had given birth. This custom has its background in The Old Testament and it implied that after giving birth a woman is unclean for a certain period. Therefore the woman should not touch anything holy or enter the temple. In the Lutheran Church this ceremony was “for praising the Lord and for the sake of virtue”.¹¹ In some parts of Norway this custom survived until the 1930s. Bastiansen refers to *Erik Rosenkrantz’ Recess* of 1562 for the

⁹ Sogner, Lindstedt Cronberg and Sandvik, ‘Women in Court’, p. 183.

¹⁰ See discussion in chapter 1.

¹¹ Ann Helene Bolstad Skjelbred, ‘Rites of Passage as Meeting Place: Christianity and Fairylore in Connection with the Unclean Woman and the Unchristened Child’ in *The Good People: New Fairylore Essays*, ed. by Peter Narváez (New York and London: Garland Publishing, Inc. 1991), p. 217.

fief of Bergenhus as an example of a stricter attitude towards extra-marital sexuality after the Reformation. Among other sanctions, this document prohibits so-called loose women from coming to Church after giving birth.¹² Telste also discusses this custom,¹³ and it is elaborated on in a more detailed examination of women in confinement by Ann Helene Bolstad Skjelbred. During the period between giving birth and being churchd a woman was considered both unclean and heathen. She was not thought to be part of the Christian community, and as an unclean woman she could harm her environment. The view of the woman as heathen was based on the idea that the woman was in the same situation as an un-baptised child. Both were at the mercy of evil powers; most prominent was the fear of dark sub-terrestrial forces.¹⁴

Yet this public and extremely visible condemnation of women who had had extramarital sex is by no means a post-Reformation phenomenon. Else Mundal discusses similar humiliating ceremonies which occurred during the Middle Ages. Archbishop Eiliv's third statute decrees that married women were to be churchd honourably, in contrast to unmarried mothers and women who had given birth after an adulterous affair.¹⁵ The question of bodily purity—or impurity—was also addressed in Bishop Thórlákr of Skálholt's penitential which prescribes three year penance for intercourse with menstruating women.¹⁶ Possibly men's fear of women's blood or fluids is reflected here. In several of her works, religion historian Gro Steinsland stresses that it was Christianity which first introduced the idea that humanity was in principle sinful, and it was Christianity which attached notions of uncleanness to the human body and sexuality. Ideas on sexual impurity had no roots in Norse mythology and life.¹⁷ Concepts of impurity connected to female sexuality and reproduction arrived in Norway as a by-product of Christianity, and also here Lutherism adhered to already long-established principles.

¹² Bastiansen, 'Væ dig Bergen', p. 29.

¹³ Telste, *Mellom liv og lov*, p. 97.

¹⁴ Ann Helene Bolstad Skjelbred, *Uren og hedning: Barselkvinnen i norsk folketradisjon* (Bergen: Universitetsforlaget, 1972), pp. 16, 48–49.

¹⁵ Mundal, 'The Double Impact', p. 246. (NgL, III, p. 261).

¹⁶ Rafnsson, 'The Penitential of St. Torlakur', p. 25.

¹⁷ Gro Steinsland, *Eros og død i norrøne myter* (Oslo: Universitetsforlaget, 1997), pp. 158–160.

CONCLUSION

THE LONG HIGH MIDDLE AGES

In the introduction, I advanced the hypothesis that the period between the second half of the thirteenth century and the *Norwegian Law* of 1687 was characterised by significant continuity in legislation and legal practice in regards to the criminalisation of sexual acts, punishments, and gender equality under the law. The empirical analysis presented above supports my initial hypothesis. Consequently, the traditional view of a break at the time of the Reformation needs to be dismissed.

Old and New

When the political elite finally accepted Christianity in the eleventh century, the lawthings agreed to new rules regarding daily life, belief and morals, and changes that also included new norms for sexuality. First, prohibitions of incest, bigamy, sexual activity on certain days of the week and year, and bestiality were introduced.¹ At the same time that these sexual acts were criminalised, the principle that these acts were also sinful and needed to be atoned for by doing penance was formulated in the Christian laws. Criminalisation implied that the individual became liable to prosecution. This amalgamation of crime, sin, and individual liability to prosecution, occurred already during the eleventh century. A more thorough revision of the Christian laws took place during the second half of the twelfth century, in all likelihood with Archbishop Eystein as its driving force. The development can be traced in the *Old Christian Law of the Frostathing* and in the *Magnustext* of the *Old Christian Law of the Gulathing*. Additional sexual acts were criminalised, for example homosexuality in the *Magnustext* of the *Old Christian Law of the Gulathing* and adultery and fornication in the *Old Christian Law of the Frostathing*. Finally, the younger Christian laws

¹ See chapter 3.

of around 1250 decreed the criminalisation of the complete spectrum of extramarital sexuality for the entire country.

Criminalisation led to sentences, commonly fines payable to the Church, sometimes also to the Crown. During the second half of the twelfth century, the number of crimes punishable by outlawry increased. In addition, rules for *landsvist*, a system under which an outlaw could buy back his life from the Crown, were included in the Christian laws sections in the *Old Law of the Frostathing*. The conflict between King Sverre and the Church about the level of fines due to the archbishop in cases under Christian law, points to a certain implementation of these laws by the late twelfth-century. As documentary evidence shows, public authorities collected fines for adultery by the end of the thirteenth century. Regarding the question of gender equality in law, both high- and late medieval and post-Reformation legislation treated men and women as equals in the same categories of sexual crimes, although in practice it was mainly men who were charged and sentenced. Finally, it should be stressed that there is continuity in the principle of publicity for the formalisation of betrothals and marriages in the legislation of the High Middle Ages and that of the post-Reformation period. Yet again, in practice it appears to have been difficult for these ideas to gain general acceptance, all the way from the Middle Ages until long into the eighteenth century.

During the High Middle Ages, substantial changes were made concerning the civil law aspects of sexuality. The *Landslaw* of 1274 prohibited revenge killings in cases of adultery and fornication, replacing them by compensation to the woman's family as the only accepted resolution. Consequently, the sources allow for the assertion that the high medieval state introduced a novel and comprehensive concept of criminalisation and punishment, a point long made by Norwegian medievalists, in particular Knut Helle. Steinar Imsen describes a similar development for dealing with manslaughter, and Sverre Bagge supports this view based on his analysis of the *King's Mirror*.² The *Landslaw* introduced yet another change to the civil law aspects of sexuality. Unmarried women

² This is the topic of Imsen, *Norsk bondekommunalisme*. Bagge, *The political thought*, p. 84 writes: "[...] as an element in the transformation of society by the monarchy, a new view of crime and punishment is to be given practical effect, the king and his representatives are to assume responsibility for, or at least control, the execution of punishment or vengeance which for the most part had previously been the domain of individual groups of kinsmen."

who initiated sexual relations or who married without the permission of their guardians risked losing their inheritance. Such rules were in all likelihood established in order to counter the effects of the doctrine of consent. These regulations can therefore not be attributed to gender discrimination by the Lutheran state.

Although I deny the claim made by Early Modern Period historians that the Reformation triggered a break with the medieval legal system, some changes were gradually brought in after 1537. First, this work has shown that after the Reformation, sexual acts were in fact criminalised to a *lesser* degree. The protestant state limited the definition of incest, no longer including sexual relations with so-called spiritual kin and relatives of the fourth degree. However in at least parts of the country, it took some time before this new, less comprehensive understanding of incest gained ground.³ A priestly synod in the diocese of Stavanger in 1578 ordered that priests should inform their congregations that marriage between so-called spiritual kin was no longer forbidden. Quite obviously, the general population had not yet realised that the medieval prohibition had been abolished.⁴ Although the Crown made repeated public pronouncements that marriages between relatives further removed than second cousins were now legal, by the second half of the seventeenth century fines were still being collected in some parts of the country for sexual relations between relatives of the fourth degree.⁵ In addition, after the Reformation the laws prohibiting sex on two hundred specifically named days were repealed.

One revolutionary change was introduced: protestant ministers, as opposed to catholic priests, were allowed to marry. As Erik Gunnes however has shown, in practice the change was less dramatic since during medieval times it had not been uncommon for priests to co-habit with women. Nor did priests always consider it urgent to formalise these relationships after the Reformation.⁶

³ Robberstad, *Frå gamal og ny rett*, pp. 41–42 notes that village records and local traditions show that people in certain areas calculated kinship into the fourth degree until the twentieth century.

⁴ Robberstad, *Frå gamal og ny rett*, pp. 37–38. See also *Stavanger domkapitels protokol*, p. 548.

⁵ Natvik, *Brotsatferd i Sogn og Sunnfjord*, pp. 129–133 documents that this was the case in 1660s Sogn, a district in Western Norway.

⁶ Erik Gunnes, 'Prester og deier—sølibatet i norsk middelalder', in *Hamarspor. Eit festkrift til Lars Hamre*, ed. by Steinar Imsen and Gudmund Sandvik (Oslo: Universitetsforlaget, 1982), pp. 20–44.

Regarding punishment, the most obvious novelty is that post-Reformation laws explicitly enjoin the death penalty for crimes which in medieval legislation entailed outlawry. Outlawry entailed the confiscation of property, and it sometimes also took the form of banishment, where the outlawed was deprived of his property, civic rights and excluded from society in all respects. Yet a closer analysis shows that outlawry might also imply capital punishment, a conclusion drawn from the fact that the outlawed criminal had the right to apply to the Crown to have his life spared. In addition, there is evidence that the death penalty was also pronounced before the Reformation. Otherwise, there seems to have been considerable continuity regarding punishments for sexual crimes since fines were the most common form both during the Middle Ages and after the Reformation. In the sphere of Church discipline, the most fundamental change after the Reformation was that one could no longer atone for sins by fasting, going on a pilgrimage, or doing good deeds. Bergan explains that after the Reformation, only “spiritual means” were to be employed until the sinner was publicly pardoned. Spiritual means could entail readings from the Bible, and in the worst case, exclusion from communion.⁷ The stricter Church discipline of the seventeenth century should be seen as a re-orientation towards medieval practices, since Church discipline was again more closely connected to the punishments meted out by the secular authorities, and since Church discipline itself also reverted to a means of coercion.

During the period between the issuing of the *Landslaw* and the *Norwegian Law* of 1687 there were no noteworthy changes in criminal or civil law with regard to gender equality.

This work therefore dismisses the traditional views that the Reformation led to increasing criminalisation of sexual acts, that the sentences grew in severity, and that the position of women deteriorated.

Premises

It is necessary to make a final pronouncement on the premises upon which the traditional view of a break is based.

⁷ Bergan, *Skriftemål og skriftestol*, p. 36.

I have questioned the traditional choice of perspectives. Norwegian society from the High Middle Ages to the end of the century of Reformation has been depicted as more primitive, and the state as less developed than they were in reality. In many ways, the traditional view operates with a simplified picture of a society ruled by civil law until the Early Modern state began to criminalise people's sexual lives. Medievalists stress that the medieval development included public jurisdiction under the authority of Crown and Church with the co-operation of well-organised local communities. International research also questions the traditional view that the position of women deteriorated markedly after the Reformation. The present work finds support in Marjory McIntosh's recent proposal of continuity.⁸

Whether our perspective is one of continuity or of dramatic change also depends upon which *sources* we base our analysis on. Historians of the Early Modern Period pre-suppose that medieval legislation was suppressed after the Reformation. Consequently, it was considered futile to examine it in detail. I take issue with the very premise. As pointed out in the introduction, Oluf Kolsrud's article on the Christian laws and the Church Ordinance from 1917 is an important work.⁹ Also the collection of articles *Canon Law in Protestant Lands* has relevant points, it shows that in the countries which changed confession, older legislation was incorporated into modern laws and society was at ease with this change. This outweighed the fact that the older laws had originally been based on or inspired by papal pronouncements.¹⁰ Even if the Norwegian Church was replaced by a Danish-Norwegian union, canon law—in Norway first and foremost found in the Christian laws—was not abolished. Medieval Christian laws were incorporated into subsequent laws throughout the sixteenth century, and the superintendents also initiated the translation of the Christian laws. Besides, the Christian laws were also published in a much shortened form in so-called case-lists. These case-lists were to a certain degree updated by including rules from the new post-Reformation laws, such as the prohibition of praying to saints and crossing oneself. Indeed, the majority of these case-lists have

⁸ McIntosh, *Controlling Misbehaviour*, pp. 14–15.

⁹ Kolsrud, 'Kristenret og Kirkeordinants', pp. 185–211.

¹⁰ Helmholz, 'Introduction', p. 12 gives this summary: "Jurists who upheld the place of the canon law in Protestant lands therefore regarded many of the laws promulgated by the papacy as having become a part of their own law through long-term usage and consistency with right reason."

survived in manuscripts from the second half of the sixteenth century.¹¹ This interest in continuing to work with medieval Christian laws and to apply them in practice does not sit well with claims that they were considered obsolete and abolished.¹²

As this work has shown, the “new” laws against sexual crimes issued during the period between the Reformation and the promulgation of the *Norwegian Law* of 1687 are to a very large degree based on pre-Reformation legislation. With this, the Lutheran state provided continuity rather than advocating a break. The state assumed responsibility for the educational, disciplinary and punishing duties of the Church. The reformers and the authorities turned to existing laws, applying them as far as necessary, and in as far as they did not run counter to the new theological principles. “And for most aspects of the law, those principles did not in fact dictate a contrary result” concludes Helmholtz, a judgement also valid for Norway.¹³

One of the clear principles of the Reformation was that laws were to be derived from God’s word alone and improvements of and discussions on the post-Reformation laws were also made with reference to the Bible. Especially the rules governing incest were the subject of a long discussion, just as they had been during the Middle Ages. Some reformers argued in favour of a more substantial break with the past, but the fact that they came to no agreement on this shows that a wide spectrum of possibilities was considered. Even if the slogan was “back to the Bible”, it is necessary to remember that the Christian laws derived important principles from canon law—which in turn was inspired by the Bible.

Since the construct of a *break* with the Middle Ages has been an important premise for historians of the Early Modern Period, there are no independent studies on either the legal practice or the legislation before the Reformation. Moreover, since medievalists have focused upon the Old Norse period, several hundred years between the mid thirteenth century and the end of the century of the Reformation have been poorly studied. It must also be admitted that sexuality was a somewhat dubious area of study for earlier generations of scholars. Consequently, the picture drawn of the medieval legal situation in

¹¹ For a more detailed discussion of these legal sources see Riisøy, ‘What’s on’ and Riisøy, ‘Sakslister: Kristenrettslovgivning i kortform’, *passim*.

¹² Næss, ‘Trolldomsprosessene’, p. 39; Sunde, *Speculum legale*, p. 249.

¹³ Helmholtz, ‘Introduction’, p. 11.

studies concerning sexual crimes by historians of the Early Modern Period is at times inadequate, and medieval society is often depicted as a society where conflicts mainly entailed civil law consequences. This society supposedly survived well into the century of the Reformation. At the time of the political and religious changes following in the wake of the Reformation, the state proper arrived in Norway, continuing to grow from then on. This is the dominating view of social and political development, within which much of the research on illegal sexuality is conducted. It follows that the massive criminalisation of sexuality, more severe sentences, and a worse lot for women was a given.

Yet this work shows a continuation of medieval principles in post-Reformation laws against sexual crimes and a continuation of much of medieval legal practice. I shall therefore conclude with, overall, new laws and old principles are six of one and half a dozen of the other.

APPENDIX I

The most relevant paragraphs in the oldest legislation, the Christian laws as well as the secular laws, are translated in *The Earliest Norwegian Laws*. The most frequently cited paragraphs from the younger Christian laws and later legislation will be listed here.

*Adultery: the younger Christian laws*¹

Nu er þat æinfalldr hordomr ef madr tækr æinløypa kono vndir sina æighna kono. Sua ok ef kona tækr æinløypan man vndir sinn æighin mann. En huer at slicu værdr kunr æda sanr. boti byscupi .iij. mærkr oc gangi til skripta. En þat er tuiualdr hordomr æf madr a ser æignar kono oc tækr annars æignar kono oc sua ef kona a sær æigin mann oc tækr honn annara(r) kono æigin mann. er slik gærd miok liot bædi firir gudi oc monnum.²

Oc sua sem synden awkatz til helfningar, sua awkatz scriften oc fear sækter firi þau werk.³

Now it is adultery in the first degree if a man takes an unmarried woman in addition to his wife. Likewise if a married woman takes an unmarried man in addition to her husband. Everyone who is guilty of this act shall pay the bishop a fine of 3 marks and go to confession. And it is adultery in the second degree if a married man takes another man's wife and likewise if a married woman takes another woman's husband.

Such a deed is considered evil before God as well as humans.

And such as the sin will increase twofold, the penance and the monetary fine will likewise increase [meaning a twofold increase] for such an act.

¹ NB § 18, (*NgL*, II, p. 301); NG § 26, (*NgL*, II, pp. 320–321); NB II § 22, (*NgL*, IV, pp. 173–174).

² NG § 26, (*NgL*, II, pp. 320–321) has not added this clause.

³ This sentence is added in NB II § 22, (*NgL*, IV, pp. 173–174).

Adulterers who “ran away” (brot laupa), the younger Christian laws⁴

Þat er nu þui nest at þæir men sem brot laupa med æignar konom manna þa ero þæir obota men bædi firir konongi oc karli oc firir gort fe oc fridi landi ok lausum oyri vid konong. drepir oc døyddir huar sem þæir værda staddir oc æighi kirkiu græfir. [en byscup æignz þar af til þriggia marka.

Then it is so that those men, who run away with another man's wife, are outlaws before king and men and they have forfeited their real estate, movables and the peace of the country to the king. Anyone can kill them wherever they may be found, they are not to be buried in the churchyard and the bishop shall have three marks of their belongings.

Bestiality and Homosexuality, the younger Christian laws⁵

En sa madr er dryghir likams losta vid nockot annat kuikindi en kono oc værdr han sannr at þui þa er han vtlæghr [oc fe hans allt vid konong en byscup lytr þar af .iij. mærkr.

And if a man engages in bodily pleasure with any other living being but a woman, and he is found guilty of it, then he shall be outlawed and all of his property [is forfeited] to the king except the bishop shall have 3 marks of it.

Incest, the younger Christian laws⁶

Nv er þat þui nest at ængi skal sina frendkono ne sifkono fa til æighnar kono eda hafa at likams losta nermæir en fimta manni fra syskinum at tælia. En ef madr hæfir frendkono sina eda sifkono at fiorda manni iamfaritt þa skulu þau att skiliazt oc skal han bœta byscupi .xij. aura oc gangi til scripta. En ef madr hæfir Þrimenning sinn at likams losta þa skulu þau skilias at oc bœta byscupi .iij. mærkr oc gangi til scripta. En ef madr tækr at likams losta systrung sina æda brødrungh þa skulu

⁴ NB § 20, (NgL, II, p. 302); NG § 29, (NgL, II, p. 322); NB II § 24, (NgL, IV, p. 174).

⁵ NB § 24, (NgL, II, p. 304); NG § 33, (NgL, II, p. 324); NB II § 29, (NgL, IV, p. 176).

⁶ NB § 21, (NgL, II, p. 302); NG § 30, (NgL, II, p. 322); NB II § 25, (NgL, IV, p. 175).

þau skiliaz at ok [skall han bota byscupi halfa fimtu mork oc ganga till scripta vid sialfan byscup.

Next, no one shall have his female relative, whether biological or affine, in marriage or for bodily pleasure closer than the fifth degree counted from siblings. And if a man possesses his female relative in the fourth degree, then they shall part and he shall pay the bishop 12 oras and go to confession. And if a man possesses his second cousin for bodily pleasure, they shall part, pay the bishop 3 marks and go to confession. But if a man possesses the child of his mother's sister or the child of his father's brother, they shall depart, he shall pay the bishop 4,5 marks and go to confession with the bishop himself.

Decree of 1478⁷

Første artickell er ath the mend, som bliffve wdtslege i cristenrettenn, thee ere the, som sönde [meth] sine skyldinge i første oc annen leedt. Skall thet goetz skifttes i helminng mellom konningen och kircken, om thee komme till skriffte eller ei. Endt thee som finnes meth den s[l]emme oc usømelig gerninng, som er at blandes meth boofee eller i annen slig slem gerninng, som er i modt naturen, de skulle oc vere wdtslege oc theris goetz skall skifttis till helminngs som før er neffndt. Endt lifvet skulle thee tiigge aff konningen, om de komme till scriffte eller ei. War ther met saa samtyckt, effther thi nu er forsacth, ath kongens ombodtsmandt skulle ei beware [seg] meth frille lefnit, hordome eller skildskaff i tredie ledt eller fierde, och ingenn secth ther aff tage i noger maade....

Tredie artickell. Thee mendt eller kaaner, som bort løpe met annen mandt eller qvinner, eller thet finnes, at thee haffve thwaa feste qvinner, thee ere udsleige, och faller theris goetz helthenn under kongen och helten under kirken.

First article. People who are declared outlaws according to the Christian law, are those who commit a sin with their relatives in the first and second degree. Their property is to be divided between the king and the church, notwithstanding they go to confession. And those who

⁷ NgL, 2rk, II, pp. 270–271.

are found with the wicked and gross indecency which is to mix with chattel or other such wicked deeds that are contrary to nature, should also be outlaws and their belongings be divided in half as previously stated. They could beg the king's mercy for their lives, notwithstanding they go to confession. It was acknowledged, according to what has been said, that the kings ombudsman should not prosecute fornication, adultery or incest in the third or fourth degree, and in no way collect fines for these cases.

Third article. Those men or married women who run away with other men or women, or it is revealed that they have two fiancées, are outlaws, and their belongings [shall be divided] half to the king and half to the church.

Ordinance against loose living of 1617⁸

Wi Christian den Fierde etc. Giøre alle vitterligt, at eftersom Skiørleffnet oc Letfærdighet daglig tiltager oc forøgis, oc de bøder, som Recessen for saadane forseelser tilholder at udgiffves, ere saa ringe, at mange der aff til Synd oc Løsactighed foraarsagis: da haffve vi det naadigst for got anseet her om saaledis at forordne, at naar nogen sig i saa maade forbryder, da skulle de begge derforre stande aab enbare Skriffte, oc dersom de hinanden ectendis vorder, maa de affsone effter Recessen. De so icke ectendis vorder, skulle i lige maade staa aabenbare Skriffte, oc der foruden skal hand udgiffve til sit Herskab tolff Rixdaler, oc hun sex Rixdaler. Oc saa frembt de saadanne Bøder icke formaar, da skulle de effter deris fromue oc siden met Fengsel oc paa Kroppen straffis. Oc dersom saadant, Gud til fortørnelse oc andre til forargelse, tit oc offte affe en Person gegaaes, da skal hand effter hans formue oc paa Kroppen eller med Fengsel straffis, efter hans formue oc paa Kroppen eller med Fengsel straffis, efter som hans modtvillig forseelse befindis, oc hun tredie gang uden ald Naade straffis til kaget.

We, Christian the Fourth, make known, that because loose living and frivolity is increasing daily, and the fines decreed by the Recess for these offences are so insignificant that many therefore are led into sin and loose living, we have therefore decreed that when someone commits a

⁸ *Danske Kirkelove*, vol. 3, p. 62.

crime in such a way, they should give a public confession and if they marry each other, they shall be punished according to the *Recessen*. Those who do not marry shall likewise give a public confession, and in addition he shall pay his Master (i.e. King) 12 riksdalers and she 6 riksdalers. If they cannot afford such fines, they shall pay according to their wealth and afterwards be imprisoned and punished upon their bodies. If such deeds are often committed by a person, to the wrath of God and others to indignation, he shall according to his wealth be punished upon his body or with prison, and she shall be punished by whipping for the third time offence.

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